TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1554.

THE STEAMSHIP "BREAKWATER," HER ENGINES, &c., THE OLD DOMINION STEAMSHIP COMPANY, CLAIMANT, APPELLANT,

vs.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED NOVEMBER 12, 1890.

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1 U. S. Circuit Court, Eastern District of New York.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Libellant & Appellee,
vs.
THE STEAMSHIP "BREAKWATER," HER ENGINES, &c., THE OLD DOMINION STEAMSHIP COMPANY, Claimant & Appellant.

Bill of Exceptions.

The pleadings in this cause are as follows:

To the Honorable Charles L. Benedict, judge of the district court of the United States for the eastern district of New York:

The libel and complaint of The New York, Lake Erie and Western Railroad Company against The Steamship Breakwater, her engines, tackle, apparel, and furniture, and against all persons lawfully intervening for their interests therein, in a cause of collision, civil and maritime; and thereupon the libellant alleges and articulately propounds as follows, to wit:

First. That during the times hereinafter mentioned the libellant was and is a corporation duly organized and existing under the laws of the State of New York and capable of suing and being sued.

2 Second. That during said times the libellant was and is the owner of the steam ferry-boat Pavonia, together with her engines, tackle, etc., and which said ferry-boat, at and previous to the collision hereinafter mentioned, was tight, staunch and strong, and well and sufficiently tackled, manned, and equipped; that said ferry-boat was running on the libellant's ferry, known as the Pavonia ferry, between the foot of Chambers street, in the city of New York, and the foot of Pavonia street, Jersey City; that said ferry had been operated by the libellant and its predecessors for many years, and the said ferry-boat Pavonia and sister ferry-boats connected with the said route were and had been in the habit of departing from and reaching their said respective ferry-slips at regular and appointed intervals, which custom was well known to those navigating the waters in the vicinity of said ferry.

Third. That on or about the 16th day of December, 1887, the said ferry-boat, having competent officers and with a careful lookout properly stationed, at about 4 o'clock and 50 minutes in the afternoon of said day, left the said Chambers-street slip, bound to her said Pavonia-street slip; that the tide was strong ebb and the wind strong from the northwest; that at the time of so leaving the said ferry-boat sounded a long, loud, and distinct whistle. The said steamship Breakwater was then observed from the said ferry-boat about abreast of the mouth of the Barclay-street ferry-slip and well in to the New York shore, bound directly up the river; that the said steamship Breakwater sounded one whistle to the said ferry-

3 boat as an indication for the said ferry-boat to keep her course, which signal was promptly answered by a signal from the said

ferry-boat of one whistle, and the said ferry-boat's helm, which had been hard-a-port from the time of leaving the bridge of her slip, was kept so, and her speed, which had been before under a slow bell, was increased to full speed; that as the said ferry-boat emerged from said slip she necessarily sagged down somewhat under the influence of the said tide and wind, but kept her heading about the westward; that shortly after the exchange of the signals between the respective vessels as aforesaid it was observed on the ferry-boat that the steamship was keeping up her headway and continuing the same course and heading up the river, which, if not changed, would render a collision imminent; whereupon a signal of a single blast of the said ferry-boat's whistle was sounded, which signal was immediately answered by a single blast of the said steamship's whistle. The ferry-boat kept her course and headway. The steamship, instead of changing her course or slackening her speed, so far as could be observed, kept on; whereupon the ferry-boat sounded an alarm whistle. The steamship still maintained her course and headway, and shortly after her stem came in contact with the ferry-boat on the latter's port side just abaft of her wheel; that such was the headway of the steamship at the time that the heavy wearing piece and guard beam of the ferry-boat were cut through and the stem of the steamship penetrated through the cabin and into the hull of the ferry-boat; that said collision took place about abreast of the slip between the Providence and Fall River piers, im-
4 mediately below said Chambers-street slip, and about four hundred feet from the end of said piers.

Fourth. That said collision was in no way owing to any fault or neglect on the part of said ferry-boat Pavonia or those navigating her, but was entirely due to the neglect of the said steamship Breakwater and those navigating her in, among other particulars, these, to wit:

(1.) That the said steamship was proceeding up the river in too close proximity to the shore and in the vicinity where ferry-boats and other vessels are almost constantly passing out and in to their respective slips.

(2.) That the said steamship was proceeding at a too great rate of speed, particularly when in such close proximity to the shore and the slips in that vicinity.

(3.) That the said steamship had and kept no competent or proper lookout.

(4.) That the respective vessels, being on crossing courses as aforesaid, and the steamship having the ferry-boat on her starboard side, should have kept out of the way of the said ferry-boat.

(5.) That the steamship was bound to observe the necessary course of the ferry-boat under the circumstances and allow her sufficient space therefor, which she failed to do.

(6.) That she did not change her course, but maintained it until the time of the collision; that she did not stop nor back until it was too late to avoid a collision.

Fifth. That it will necessarily cost to repair the damages
5 to the said ferry-boat on account of said collision the sum of

thirty-five hundred dollars; that the said ferry-boat will be necessarily detained while undergoing repairs, as near as may now be estimated, the period of thirty days, and that the fair demurrage for the same will be $100 per day, making a total for damages, including demurrage, the sum of six thousand five hundred dollars.

Sixth. That the said steamer Breakwater, her engines, etc., are now within the jurisdiction of this honorable court.

Seventh. That payment for said damages has been demanded and refused.

Eighth. That all and singular the premises are true and within the jurisdiction of the United States and of this honorable court.

Wherefore the libellant prays that process in due form of law may issue against the said steamship Breakwater, her engines, tackle, and furniture, and that all persons having or pretending to have any interest therein may be cited to appear and answer all and singular the matters so as aforesaid propounded, and that this honorable court will be pleased to decree for the libellant, with the costs, and to condemn the said steamer and tackle, etc., to be sold to pay the same, and for such other and different relief in the premises as shall to law and justice appertain.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO.,
By JOHN KING, *President.*

Sworn to before me this 20th day of December, 1887.
GEO. E. GRANT,
Notary Public, N. Y. City and Co.

6 CITY AND COUNTY OF NEW YORK, *ss:*

John King, being duly sworn, says he is the president of the New York, Lake Erie and Western Railroad Company, the above-named libellant; that he has read the foregoing libel and knows the contents thereof, and the same is true to the best of his information and belief.

JOHN KING.

Sworn to before me this 20th day of December, 1887.
GEO. E. GRANT,
Notary Public, N. Y. City and Co. (57).
WILCOX, ADAMS & MACKLIN,
Proctors for Libellant.

WILCOX, *Advocate.*

Endorsed: Libel. Filed December 20th, 1887.

To the Honorable Charles L. Benedict, judge of the district court of the United States within and for the eastern district of New York:

The answer of the Old Dominion Steamship Company, owners of the steamship Breakwater, to the libel and complaint of the New York, Lake Erie and Western Railroad Company against said steam-

ship Breakwater and against all persons lawfully intervening for their interest therein in the cause of collision, civil and maritime, alleges and articulately propounds as follows:

7 First. The claimants admit the incorporation of the libellant.

Second. They are informed and believe that at the time mentioned in the libel the libellants were the owners of the steam ferry-boat Pavonia. They have no knowledge of the condition of the said ferry-boat. They deny that she was well and sufficiently manned.

They admit that said ferry-boat was running on libellant's ferry, known as the Pavonia ferry, between the foot of Chambers street, in the city of New York, and the foot of Pavonia street, Jersey City.

They admit that the said ferry had been operated by the libellants and their predecessors for many years.

They have no knowledge as to whether or not said ferry-boat Pavonia and sister ferry-boats were or had been in the habit of departing from or reaching their ferry-slips at regular appointed intervals, or that any alleged custom to that effect was well known to those navigating the waters in the vicinity of said ferry.

Third. They admit that on the 16th day of December, 1887, the said ferry-boat Pavonia, between half past four and five o'clock in the afternoon, left the said Chambers-street slip, bound to her said Pavonia-street slip. They deny that she had competent officers, or that she had a careful lookout properly stationed. They admit that the tide was strong ebb and the wind strong from the northward and westward.

They deny that at the time of so leaving the said ferry-boat sounded a long, loud, and distinct whistle.

8 They have no knowledge that the said steamship Breakwater was then observed from the said ferry-boat about abreast of the mouth of the Barclay-street ferry-slip and well in to the New York shore, bound directly up the river.

They deny that the said steamship Breakwater sounded one whistle to the said ferry-boat as an indication for the said ferry-boat to keep her course, or that said alleged signal was promptly answered by a signal from the said ferry-boat of one whistle.

They have no knowledge that the said ferry-boat's helm had been hard-a-port from the time of leaving the bridge of the slip, or that it was kept so, or that her speed had been before under a slow bell, or that it was increased to full speed.

They admit that as said ferry-boat emerged from her slip she sagged down under the influence in part of the tide and wind. They deny that she necessarily sagged down.

They admit that her heading was about to the westward.

They have no knowledge that shortly after the alleged exchange of signals it was observed on the ferry-boat that the steamship was keeping up her headway and continuing on the same course and heading up the river, which if not changed would render a collision imminent.

They admit that a signal of a single blast of the said ferry-boat's

whistle was sounded, which signal was immediately answered by a single blast of said steamship's whistle.

They deny that the steamship kept on.

They admit that the ferry-boat kept her course and headway and sounded an alarm whistle.

9 They deny that the steamship maintained her course or headway.

They admit that the steamship's stem came in contact with the ferry-boat's port side abaft of her wheel.

They deny that by reason of the headway of the steamship the heavy wearing piece and guard beam of the ferry-boat were cut through or the stem of the steamship penetrated through the cabin and into the hull of the ferry-boat.

They admit that said collision took place about abreast or a little below the slip between the Providence and Fall River piers and between four hundred and five hundred feet out in the river.

Fourth. They deny each and every allegation of the fourth article of the libel.

Fifth. They have no knowledge as to the cost of the repairs of the damage to said ferry-boat nor as to the demurrage while undergoing repairs.

Sixth. They admit the allegations of the sixth and seventh articles of the libel.

Seventh. They deny that the premises in the libel, all and singular, are true. They admit the jurisdiction of the United States and of this honorable court.

Eighth. And for a further answer these claimants allege the facts and circumstances with regard to said collision to be as follows:

10 That on the afternoon of December 16th, 1887, the steamship Breakwater, belonging to these claimants, with a cargo of merchandise laden on board and with a number of passengers on board, came into the port of New York from sea on one of her regular trips from Virginia.

That said steamship was tight, staunch and strong, and properly and sufficiently officered, manned, and equipped.

That her regulation lights were properly set and brightly burning. She had a competent lookout properly stationed forward and faithfully attending to his duties.

Her master and first officer were in the pilot-house, together with a quartermaster, who was at the wheel, and a competent engineer was stationed at the engine.

That when between Castle William and the Battery the engine of the steamship was slowed down, and she proceeded up the river at a slow rate of speed towards the wharf at the foot of Beach street, New York city, which was well known to those navigating the waters in that vicinity as the wharf of the claimants.

That the tide was strong ebb and the wind strong from the northward and westward.

That when about off Cortlandt-street ferry the said steamship, in

order properly to make the said wharf, hauled in somewhat towards the New York piers.

That when said steamship was about past Barclay-street ferry the ferry-boat Pavonia was seen starting from her slip at the foot of Chambers street, New York city, and bound, as was understood, to her slip in Jersey City.

11 That as she was leaving said slip the said ferry-boat sounded a signal of one whistle, indicating to the said steamship that she intended to cross the latter's bow.

That immediately a signal of one whistle was sounded in reply to the steamship and her engine was stopped.

That at the time there were two tugs, one with a tow, between the steamship and the New York piers.

That as the ferry-boat got out of the slip her head, instead of swinging up the river, swung down the river towards the said steamship, which heading she thereafter maintained.

That after the said ferry-boat was out of her slip she again sounded a signal of one whistle to the steamship, which was immediately answered by a signal of one whistle from the Breakwater, and her engine was immediately reversed at full speed, and at the time of the collision the headway of the said steamship was entirely stopped.

That while said steamship was so backing at full speed and when the vessels were close together the said ferry-boat again sounded a signal of one whistle, which was immediately answered by one whistle from the steamship, and immediately before the collision the ferry-boat sounded an alarm signal.

That said ferry-boat kept on heading down the river, and, with the effect of such headway and the tide and wind, came down upon the said steamship with great force and violence, the ferry-boat's port side coming in contact with the stem of the steamship, cutting into the ferry-boat, twisting the stem of the steamship, and breaking in her bows on either side and doing other serious damage.

12 That at the time of the collision the said steamship was between four hundred and five hundred feet from the end of the pier at the foot of Murray street, and her bow was about on a line with the upper side of said pier.

And these claimants deny each and every allegation in anywise to the contrary hereof.

Ninth. And these claimants further allege that said collision was in no manner caused by any fault, negligence, carelessness, or inattention on the part of those in charge of the navigation of said steamship, but that the same was either an inevitable accident, due to the force of the wind and tide, or was caused by reason of the negligence, carelessness, and inattention on the part of the said ferry-boat, in that, among other things, her pilot started her from her slip across the course of the steamship and without paying any attention to her or seeing the Breakwater, although she was then in plain sight and her position and course to her destination were plainly to be seen from the ferry-boat, or in that if the Breakwater was seen by said pilot he started from said slip when he should have known that so starting created a risk of collision, instead of waiting until all risk

of collision was avoided; in that she had no competent lookout faithfully attending to his duties; in that she wrongfully left her slip in such a manner, either through lack of power or lack of sufficient headway, or failure to properly manage her wheel, that she failed to overcome the influence of the tide and wind, which
13 those in charge of the said ferry-boat were familiar with; in that her head was wrongfully permitted to swing down the river towards the steamship, whereas her proper course was up the river, away from the steamship; in that she did not stop and reverse as soon as there was risk of collision; in that she was wrongfully permitted to get entirely out of her usual proper or necessary course and outside of and below the water to which ferry-boats on such ferry are entitled, and in an unusual and extraordinary degree to enter upon the water to which the steamship was rightfully entitled and to crowd down upon the latter; in that she did not blow a long signal whistle before leaving her slip; in that her engine was improperly slowed instead of being kept at full speed when leaving said slip under such circumstances, and in other respects to be shown upon the trial.

In verification whereof, if denied, these claimants pray leave to refer to the depositions and proofs to be exhibited on the trial hereof.

Wherefore these claimants pray that they may be hence dismissed with their reasonable costs in this behalf wrongfully sustained.

OLD DOMINION STEAMSHIP CO.,
By W. H. STANFORD, *Vice-President.*

OWEN & GRAY,
Proctors for Claimants.

14 SOUTHERN DISTRICT OF NEW YORK, *ss:*

William H. Stanford, being duly sworn, deposes and says that he is the vice-president of the Old Dominion Steamship Company, the claimant above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true, to the best of his own knowledge, information, and belief.

W. H. STANFORD.

Sworn to before me this 3rd day of March, 1888.
THOMAS F. MURTHA,
Notary Public, New York Co.

Endorsed: Answer. Filed March 6, 1888.

The cause came on for trial before Mr. Justice Blatchford, circuit justice, on the 4th day of June, 1890, when there was read from the apostles on behalf of the libellant the testimony, taken on the trial in the district court, of Lawrence P. Decker, Joseph Drummond, William Conklin, Charles H. Gardiner, David Pearsall, James Carran, Gilbert I. Germond, and Harvey H. Mosher.

WILLIAM CONKLIN, being duly sworn and examined as a witness for the ferry-boat Pavonia, testifies:

(Direct:)

I was wheelman on the ferry-boat Pavonia at the time of her collision with the Breakwater. I put the wheel hard-a-port as soon as she was loose. The wheel was kept hard-a-port from that time until the collision. The captain gave the jingle bell, and then the slow bell on leaving.

Q. Do you know what bells he gave on leaving?

A. He gave the jingle bell, then the slow bell.

Q. How did you move out of the slip, fast or slow, under those bells?

A. After she slowed down, slow. I saw the Breakwater before we started; she was below Barclay street. One long blast of the whistle was given on leaving. I should judge it continued about
19 two or three seconds. The Breakwater blew one whistle next. The Jersey end of the Pavonia had got out to the end of pier
20 when that whistle came. Just as soon as the Breakwater blew one we blew him another one. Right away after the Breakwater blew, the Pavonia's jingle bell was given for full speed. No other bells were given from that time until she struck. After the first exchange of one whistle the Pavonia gave another whistle, the Breadwater answered that, then the Pavonia gave the alarm whistle. Putting our wheel hard-a-port when we left the bridge would have the effect of swinging the Jersey end bow up the river, against the rack. As the Jersey end commenced to pass the outer end of 20 the effect of the tide was to carry the bow down the river; it kept dragging us down all the time. Before the collision the bow kind of swung up. At the time of the collision she was heading right across the tide. The collision was midway between the Fall River and Providence piers (28 & 29), and about 400 feet out. I should judge the Breakwater was going about four or five knots. I couldn't tell whether the Breakwater had slowed up any from the time I first saw her; she was coming pretty good, though. Our course was the usual one under the circumsiances and with an ebb tide. When we got the first one whistle from the Breakwater she had got up abreast of Barclay street.

CHARLES H. GARDINER, being duly sworn and examined as a witness for the ferry-boat Pavonia, testifies:

(Direct:)

I was mate of the tug John A. Carnie at the time of the
20 collision between the Pavonia and the Breakwater. I saw that collision. I had the wheel of the Kearney. I was off pier 20, old number, about fifty feet astern af the Breakwater. We were coming up outside of the Breakwater, and continued along in company with the Breakwater until the time of the collision. After I got clear of pier 21 I intended to get inside of the Breakwater to get into slack water, but I didn't do it, because she sheered in shore, and

that cut me off. At the time of the collision the Breakwater was working ahead; she might have been 25 feet from her before her wheel stopped working. The collision took place about 400 feet off between 28 and 29. I can judge pretty accurately, because I travel back and forth there every day. The first whistle I heard the Breakwater give was a short blast, when her bow was just clear of Barclay-street ferry-slip. I heard an answering whistle from the Pavonia, but the Pavonia blew a long blast first, coming out of the slip, and, of course, the Breakwater must have taken that for a signal for him. When the Pavonia gave a long blast the Breakwater was on the lower side of Barclay-street ferry. This long blast was such as is usually used by all steamers as well as all ferry-boats on coming out of a slip. I so understood it at the time. It was a signal to everybody to whom it might concern. I saw the Pavonia as soon as she commenced to leave her slip. I suppose it was just as soon as she started that she commenced to blow her whistle, for I could see her edging out gradually when she blew her whistle. I should judge the Pavonia's stern was about 100 feet from her bridge when I heard the one whistle from the Breakwater. The Pavonia answered that, and gave him another one after that, when her
21 bow was about 100 feet outside the upper rack, and the latter one was answered by the Breakwater. The Pavonia gave a danger signal after that. The course of the Pavonia was about as near as they could come out on an ebb tide. I did not make any change of wheel when I saw the Pavonia coming out and coming down on the tide. I came right up till I got about abreast of the Breakwater's stern, and then I slowed down.

(Cross:)

I noticed the Breakwater's propeller moving ahead until just about the moment of collision, and the ferry-boat was then 25 feet away from the Breakwater, I should say; then the Breakwater's wheel stopped in the water. She went back just as they came together. The Breakwater was going at the rate of five miles an hour or a little less.

DAVID PEARSALL, being duly sworn and examined as a witness for the ferry-boat Pavonia, testifies:

(Direct:)

I was on the John A. Carnie as the time of the collision as captain and pilot. The Breakwater and the Pavonia were about 50 feet apart when my attention was first attracted to them. The Breakwater was going ahead at the rate of about 6 miles per hour, I should judge.

Q. Was there any diminution of that speed from the time you first noticed the Breakwater until the moment of the blow?

A. No, sir; I couldn't say as there was. The bow of the Pavonia was swinging up the river and continued on a swing up to the time of the collision. At the time of the collision I should judge she was just about holding her own (across the river). She had quite a little

swing on up the river at the time the Breakwater struck her. The point of collision was about half way between 28 and 29.

22 JAMES CARRAN, being duly sworn and examined as a witness for the ferry-boat Pavonia, testifies:

(Direct:)

I was deck-hand on the ferry-boat Pavonia at the time of her collision with the Breakwater. I was on lookout. The Pavonia whistled upon leaving her bridge. She gave a long blast. Next I heard one whistle from the Breakwater. She was about off Barclay-street ferry. The Pavonia wasn't out of the slip then. The Pavonia answered that whistle; then she gave a second one whistle when her New York end was just about clear of pier 20; that was answered by the Breakwater by one whistle. After that and before the collision I heard the alarm whistle on the Pavonia. I did not notice whether she slowed any or not before the time of the collision. I don't think she did. The collision took place midway between 28 & 29. At the time of the collision the Jersey end of the Pavonia was swinging up the river. When the Pavonia answered the Breakwater the captain gave the jingle bell. I heard no other bells up to the time of the collision. At the time of the collision the ferry-boat was going wide open.

(Cross:)

When the Pavonia gave her second signal—that is, the second after the long blast—she was heading about straight across. When the tide took effect on the bow first before her stern got clear of the slip I guess it would carry her bow down about two or three points. When her bow commenced to swing up, the Pavonia was heading so that if she went astern she would have gone between the Fall River and Providence dock. When the Pavonia first commenced to swing up she was about fifty feet from the Breakwater.

23 All the whistles had been blown except the alarm whistle before the Pavonia commenced to swing up the river.

HARVEY H. MOSHER, being duly sworn and examined as a witness for the ferry-boat Pavonia, testifies:

(Direct:)

I was pilot of the steam-tug Wyoma. I saw the collision between the ferry-boat Pavonia and the steamer Breakwater. I was in the pilot-house. I was going up the river. The Breakwater was going up the river the same as I was. Her course was maintained. I didn't see any difference in the course until the collision. The Breakwater was outside of me about fifty feet. The Breakwater was about 300 or 400 feet off the New York docks. We were running under regular speed, hooked up, and a jingle bell, going by the docks about six miles an hour. I didn't notice any gain on the Breakwater. We seemed to be holding her all along the docks. She was going about the same speed until the time of the collision. If

the Breakwater had slowed I would have noticed it because I would have gone by her, as I kept up my speed. The collision was about off pier 29, the Providence line.

Q. What first called your attention to the Pavonia?

A. When she was first coming out of her slip I see her.

Q. What called your attention to her?

A. She blowed one whistle.

Q. Had you got up to Barclay-street ferry-slip at that time or not?

A. I was about abreast of Barclay street.

Q. What was the next whistle you heard, and from what vessel?

A. I heard the next one from the Breakwater.

Q. And where was the Breakwater at that time?

A. She was about off Hoboken ferry there; Barclay street,
24 I believe it is.

Q. What was the next whistle you heard?

A. I heard one whistle from the ferry-boat again.

Q. Did you hear any other whistle after that?

A. Yes; I heard one from the Breakwater.

Q. And then did you hear——

A. Yes; I heard an alarm whistle from the ferry-boat then. At the time of the collision the Jersey end of the ferry-boat was swinging up the stream. When she was out in the river I noticed that her rudder was hard-a-port, across the starboard quarter, and it remained so. I noticed it at the time of the collision. I should judge the collision took place very near a hundred feet below the south rack of the ferry. I am not positive about that. I notcied the tide run the Pavonia down some. She sheered down a little at first. That day the tide was stronger than common.

25 *Evidence for the Breakwater.*

JAMES PAWSON, being duly sworn and examined as a witness for the steamship Breakwater, testifies:

(Direct:)

Will you speak a little loud; I am a little deaf in my left ear. I was captain of the tug-boat Nonpareil. I saw this collision between the Breakwater and the Pavonia. We were between the Breakwater and the New York piers. I was in the pilot-house. I had a tow of two barges on a hawser. My attention was called to the Pavonia by hearing one blast of the whistle. We were off pier 28, North river, or Murray street. I answered her whistle with one blast and stopped my boat. The Pavonia was coming out of her slip, and had not got half her length away from the bridge, probably. The Breakwater was about abreast of the first barge I had on the hawser. My hawser was about 100 or 120 feet long. After the Pavonia had blowed the one blast the second time I heard the Breakwater answer with one blast. The Pavonia blew and I answered, and then I heard the Pavonia blow one blast again. The Breakwater then

answered with one blast. When I heard the Pavonia's second blast her stern was about clear of pier 20. She was heading down and across the river. I heard the Pavonia blow the one whistle again, the third time, just before they came together. When the Pavonia blew the second time we were very near the lower slip of the Chambers-street ferry.

Q. Were you going faster or slower than the Breakwater in coming up the river?

A. The Breakwater was going a little the faster. I don't
26 think she gained 100 feet. The Breakwater's bow was about abreast of our stern at the time of the collision. I changed my course by porting my wheel. When the ferry-boat crossed our bow she was not more than 20 feet from us. As the ferry-boat crossed our bow I saw them heaving the wheel aport. When I heard the first whistle from the Pavonia she was moving slowly out of her slip. I understood the Pavonia's first whistle as a signal for myself and the Breakwater too, perhaps.

Q. After you stopped your boat did you notice whether or not anything was done on the Breakwater?

A. Yes, sir; I noticed that the Breakwater's engine was reversed, or rather her wheel was reversing.

Q. How soon after you stopped your boat was that?

A. Directly after the Breakwater answered the whistle. As soon as the Breakwater answered the Pavonia's whistle she reversed her wheel. When the Breakwater answered the Pavonia's first signal the first time she could not have safely ported her wheel without colliding with me or the piers. From the time I heard the first whistle of the Pavonia there was nothing that the Breakwater could have done to avoid the collision more than she did do. I think the Pavonia was five or six points down the river, from the course of the tide. As the Pavonia passed me she was heading towards Jersey, going the same as if she had a starboard wheel; the wind and tide was crowding his bow down. At the time of the collision the Pavonia seemed to be about holding her own about across the tide. I saw the two vessels strike. At the time the vessels struck the engine of the Breakwater was in motion. There was no head motion; if she had any, it was stern motion. I will say that if the
27 pilot of the ferry-boat had had his wheel hard-a-port and becketted when he left the slip, I don't think there would have been a collision. I don't see what the Breakwater could have done any more than she did do to prevent the collision.

Q. You think what caused the collision was an error of judgment on the part of the Breakwater as to how far the ferry-boat would come down the river?

A. I didn't say so.

Q. I ask you that because that is what your answer really was before.

A. I don't think there would have been any collision if the Breakwater man had known the ferry-boat was coming down as low as she did. He answered the whistle and stopped and reversed.

(Cross:)

When we passed the Barclay-street ferry-slip the Breakwater was probably 300 or 400 feet astern over our port quarter. I did not reverse at any time. I stopped the engine immediately on giving the one whistle, and about half a minute after I heard one whistle from the Breakwater. I heard the Pavonia blow her whistle the minute she left the bridge. That was the signal that I answered. I ported the helm as soon as I answered his signal and stopped the boat—rang two bells to stop quick.

WILLIAM L. PORTLOCK, being duly sworn and examined as a witness for the steamship Breakwater, testifies:

(Direct:)

I was engineer of the steamship Breakwater at the time of this collision with the ferry-boat Pavonia. Just before reaching the Battery I took the cut-off off and put steam on the ram and got the engine into condition to handle instantly. That reduced her
28 speed to about thirty turns—about half speed. I got a bell to slow and a bell to stop, and about the time I got the wheel stopped I got bells to back, and a jiugle bell, indicating to back wide open. I felt the shock of the collision. I had time enough to get the engine going back and to walk from the front part of the engine, where she is worked, around the after side of it, to where the circulating valve is—the valve that gives steam to the circulator to increase the volume of water—and come back and stood in front of the lever some little time, and I felt the shock. I got a bell to slow and stop, and had the engine stopped. One of those propeller engines will make several turns after the steam is shut off. I mean to say the engine was dead stopped when I got the bells to back and the jingle bell. It was about half a minute between the stop and back bells.

(Cross:)

The first bells I got were to slow and stop. I am positive I got the engine backing before the collision.

JOHN H. KINNER, being duly sworn and examined as a witness for the steamship Breakwater, testifies:

(Direct:)

I was pilot of the steamer Rhode Island, of the Providence and Stonington Steamhip Company. At that time my pier was at 29—the Providence pier. I saw the collision between the Breakwater and the Pavonia. I was on board the steamer Nashua, in the pilot-house; stood on the starboard side of the wheel. The steamboat was on the lower side of pier 29, bow out. My attention was attracted to these vessels by seeing a steamer coming up. I saw the masts over the Fall River dock, and was watching her come
29 along, and I soon saw it was the Breakwater. I should say the collision took place a little below the center of between

pier 28 and 29. About five hundred feet, as near as I could judge, off pier 28. I saw the bow of the Breakwater come by pier 28. She was scarcely moving through the water. I heard a whistle then and looked around and saw the Erie ferry-boat going out. She was about half-way from the Breakwater to pier 29. She was heading down the river. I don't mean she was running parallel with the river; she was quartering on the tide, heading down probably four or five points. When the two vessels came together the Breakwater, I think, was backing, going astern—that is, by the looks of her, the white water of her wheel. Before that there was no motion there whatever. When I first saw her stern come out by the Fall River dock I think she had a little downward motion, if any. When I first saw the ferry-boat she was heading a little down the river, but she was on a slew to starboard; her bow was on the slew. At the time I first saw the propeller of the Breakwater it was not abreast of the slip between 28 and 29. The Breakwater's bow was about up to 28, the Fall River line, coming out by the shed when I first saw her. I could not see her propeller when I saw her bow. Our steamer, that lies in that wharf, is 85 feet beam, the Fall River boat is about 80, and we lie abreast of each other in that slip and get a canal-boat of coal, which has a width of probably ten or twelve feet, between them. When I first saw the Breakwater her bow was probably 150 feet below the shed on pier 28. The Breakwater's stern was probably about abreast, or nearly, of pier 28 when the collision happened. When I first saw the Pavonia the stern of the Breakwater was about abreast of 28, and the Pavonia then was about half-way between our pier and the Breakwater.

ALBERT COBB GIBBS, being duly sworn and examined as a witness for the steamship Breakwater, testifies:

(Direct:)

I was second mate of the Breakwater at the time of the collision. I was on the forward deck, standing in front of the wheel-house. My attention was first called to the Pavonia by one blast of her whistle. The Breakwater's stem was then a little below pier 28. The Pavonia had headway then; she had started off from her bridge, you know, and she blew one whistle, and the Breakwater answered with one whistle. The Pavonia had just got a little ways off from her bridge; she had not got outside of her rack. I don't know exactly how fast the Breakwater was going; I should think about six or seven miles an hour. Her speed was lessened until the time of the collision, when she was going about three miles per hour through the water. When the collision took place the bow of the Breakwater was about half-way between 28 and 29. Just before the Pavonia got out past her rack she blew one whistle again, and that was answered by one from the Breakwater. I heard another one. The Pavonia blew one and the Breakwater answered. I did not hear any more. When the last two whistles were blown the Pavonia was directly ahead of us. Her hull was about forty feet from our stem.

(Cross:)

Q. Those whistles were answered?

31 A. That last whistle; yes; that was answered by one on the Breakwater. I heard three whistles from each ship—that is, the Breakwater gave three signals of one whistle each and the Pavonia gave three signals of one whistle each, and the last signal was when the Pavonia was about forty feet away; the Pavonia gave that and it was answered. At the time of the collision I think the Breakwater was perfectly still as far as her headway by the land was concerned; she was going through the water, but not going up the river; at the time our stem passed pier 28 we were going about four or five knots by the land.

JOHN E. TUNNEL, being duly sworn and examined as a witness for the steamship Breakwater, testifies:

(Direct:)

I was the first officer of the Breakwater at the time of the collision between the Breakwater and the Pavonia. I was on the bow; had been there probably a minute; before that I was in the pilot-house, on the port side. The first thing I noticed of the Pavonia she blowed one whistle; she was just starting from her slip. The Breakwater blew one whistle and her engine was stopped. The Breakwater was then about off Barclay street. I heard the ferry-boat blow one more whistle. The Breakwater then blew one whistle, and two bells were rung and the jingle bell to back at full speed.

(Cross:)

When the collision took place the vessels were between piers 28 and 29. The order was given to the engine to stop about half a minute after the first signal, and about a minute after the order to stop the order to reverse was given. The Pavonia was just

32 leaving the bridge as she blew her first whistle.

EZRA DEBALL, being duly sworn and examined as a witness for the steamship Breakwater, testifies:

(Direct:)

I was quartermaster on the steamship Nashua. I saw the collision between the Breakwater and the Pavonia. I was in the pilot-house of the Nashua. The first I noticed was the ferry-boat; she was just opened by the shed at pier 29; she was headed about two points and a half down stream—from a line at right angles right straight across the river. I next saw the Breakwater; she was just opened by the Fall River Line pier; then the bow was just out by —, coming up very slow. The next I noticed was—we kept watching them as they were coming up. The Breakwater was slowing down all the time, going slower, and the ferry-boat was going out and heading down and kind of, if anything, on a swing, and about the time of the collision I should say the Breakwater was still. I could

see that she wasn't moving any. I could just see the Breakwater's stern by the Fall River shed at the time of the collision. This collision took place about 20 feet below the center of our slip.

Q. So the Breakwater moved just her length after you first saw her before she struck?

A. Yes, sir; she might have been moving at the time they struck, but as near as I could see she was still. At the time of the collision the ferry-boat was heading about straight across the river; she might have been a trifle on the swing; she was so we could see through the ferry-boat from the pilot-house—see where the
33 teams came through; she had swung then up so we could see. When she was coming down stream she was heading down stream with the tide and wind, and when she went up then she was about straight across the river; might have been a trifle more.

DANIEL R. BEATTY, being duly sworn and examined as a witness for the steamship Breakwater, testifies:

(Direct:)

I was attached to the steamer City of Brockton and saw the collision between the Breakwater and Pavonia. I was standing in the pilot-house of the City of Brockton; that boat was lying at the north side of the Fall River dock, pier 28, North river. When I first noticed the Breakwater she was, I should judge, down off about pier 11; she was out in the stream coming in. I looked at her with the glasses. I was looking for the Breakwater; I expected her and was looking for her. When I first noticed her I supposed it was her, and when she got up further I made out for certain it was her. She was down about abreast of pier 11 then. I was watching her all the time from that time on. She was about abreast of the Barclay-street ferry when I was positive that she was the Breakwater. I saw the ferry-boat about midway between the two slips, between our dock and the Providence Line dock, between 28 and 29, about half way, and sagging down very fast and heading at an angle of about two points down the river from a line right straight across. The Breakwater had not opened out quite by our dock then—that is, her bow had not opened out by the end of our shed. She was coming up all the time very slow. When I first saw her off Barclay-street
34 ferry she was going slow. I couldn't say exactly how fast she was going, but moving along very slow. After I saw the ferry-boat the Breakwater was almost stopped. Her stem opened out about 20 feet by the end of pier 28; her pilot-house didn't open out by the shed. She couldn't have come any further than that, because the flagstaff is right in range, and she didn't come up in range of that, and she would only have to come up 40 feet to be in range of our flagstaff. As her stem did open from the end of the pier she was moving very slow; she was about stopped. Immediately previous to the time the two boats came together if anything, she was going astern, but she was stopped dead in the water by the range of the dock, and I was looking particularly at her. If anything she

was going astern at the time of the collision; she was inclined to drop astern. I should say the collision took place very nearly opposite pier 28. I should say the ferry-boat was heading at the time they struck very near right straight across, but a little down stream if anything. She was on a little swing; swinging up. I took the range the moment they came together. The Breakwater was coming up very slow; looking at her, head on, I couldn't tell exactly how fast, but when she came up abreast of pier 27 I should judge she was going by the dock not over two knots, by the docks, not through the water. She was not going back until the collision. When she got up by—when her stem was just passing pier 28 she was almost still; she wasn't going any to speak of. At the time of the collision she was stopped, as near as I could judge. She was going back, if anything, but she was nearly stopped still.

35 IRA E. DOLE, being duly sworn and examined as a witness for the steamship Breakwater, testifies:

(Direct:)

I was master of the Breakwater at the time of this collision with the Pavonia; the Breakwater was very near 1,100 tons; her length is 212 feet over all; her beam was 32 or 33 feet; she was loaded deep; her maximum speed is between ten and eleven knots; she was made of iron; we had come in from sea; the tide was a strong ebb; the wind was about northwest—somewhere from northwest to north northwest; I wouldn't be positive to the point. I was in the starboard window of the pilot-house, and the first officer, quartermaster, and a Sandy Hook pilot were there; there was a lookout forward; after we slowed down we were going some four or five miles an hour by the land; we slowed down just below or right off the Battery; I wouldn't say exactly. I noticed one tug inside of me; there were considerable many vessels about, but especially the one I noticed was the one inside of me—the Nonpareil; we were nearly up to Barclay street when I noticed her; she was a little ahead of our boat then; she had two barges on a hawser, I should think, 150 or 200 feet away from us. I think we were gaining a trifle; there wasn't much difference, because I was thinking that I would have to stop the ship when I got up further to let him go ahead of me; that I wasn't going fast enough to pass him. I had just passed Barclay-street ferry when my attention was first attracted to the Pavonia; the forward end of the pilot-house was just past; the first I noticed the ferry-boat I heard her blow one whistle; the ferry-boat
36 was under way coming out of her slip; she had not got out as far as the end of the pier which is above her slip. I blew one whistle to him; he blew one. I blew one and stopped the engine; stopped the engine right away after; pulled the whistle and then pulled the bells; next I noticed was the ferry-boat coming out and pointing. I thought she would be pointing somewhere across the river, and she was pointing right straight down for me; our boat was, I suppose, somewhere about pier 27; my attention was called to the ferry-boat by her blowing one whistle again. I an-

swered one whistle and saw by the way he was heading that there might be danger, and I rang down backing bells; the order was obeyed; at the time I heard her second whistle the ferry-boat was out of her slip; she was not out by that pier 20; between the time I rang to stop and the time I gave the backing bells the Breakwater ran about her length by the land; not any over; the ferry-boat soon after I rang the backing bells blew a third one whistle and I answered that; the ferry-boat was on the starboard bow yet, between us and the dock, between us and her slip; she was still heading down some, but swinging some; she had begun to swing then.

Q. Whereabouts did the collision take place—that is, whereabouts was your stem at the time the two boats came together?

A. The only thing I noticed about the position was that we was right abreast of pier 28, the pilot-house; our pilot-house was abreast of pier 28. I do not think we were moving by pier 28 at all.

Q. Why was it that you stopped when you heard the first whistle of the Pavonia?

37 A. I supposed she was going across our bow, and I would give her a chance to go across; when I first thought there was any danger was when I saw the ferry-boat pointing right down the river; she blew a second whistle just about that time. I answered it and gave backing bells.

Q. Full speed?

A. I won't say which first; I couldn't do them together. I gave my jingle full speed.

(Cross:)

Between the time I gave these backing bells and the collision she might have made her length. When we were passing abreast of Barclay-street ferry I think we were going about four knots by the land. I was keeping a lookout all around to the best of my ability, so that I was looking pretty carefully at the ferry-slips as I passed them, and at the other piers for sound steamers as they were coming out.

Q. Were you looking with sufficient care at the Erie slip to see when this Pavonia started from her bridge?

A. I was. Something called my attention on the other side just at the time she started; she must have started when I was looking; I had not seen the Pavonia before she started. When I turned and saw her she was blowing her whistle and had come out about half way past her center pin. I understood that he was to cross my bow, and I gave him one whistle, by which I meant to tell him to keep on and I would give him the right of way to the best of my ability. I think that if I had reversed full speed astern she would have forged her length. I didn't suppose the tide would set the Pavonia down over one length—that is, two hundred feet—from the upper bridge, the upper rack. I made the calculation it would set her down, for I stopped the ship.

Q. If you had known the tide would set her down more wouldn't you have reversed before you did?

38 A. Yes, sir; if I had supposed she was coming right down the river for me I should have reversed at once.

Q. What do you mean when you say she was coming right down for you, heading straight down?

A. Not right straight down, but she was headed off very much from the tide. The most that the Pavonia got headed down was from W. S. W. to S. W. by W. two to three points. Then her bow commenced to swing to starboard, and at the time of the collision was swinging slowly up. When I gave my second one whistle the Pavonia's stem had passed outside of pier 20; at the time of our third whistle her stern was outside of the end of — 20 about 100 feet; we were less than a length apart then, about 50 to 100 feet. She had not commenced to cross the line of our course. With the tide and the wind as it was, and the boat loaded as she was and going at half speed, she will run two hundred to three hundred feet before coming to a dead stop after a bell to reverse full speed. My best judgment is that she will go a good length and a little over.

AUGUSTUS H. MURPHY, a Sandy Hook pilot and a passenger on board the steamship Breakwater, being duly sworn, testifies as follows:

I was in the pilot-house of the Breakwater at the time of the collision that occurred between the ferry-boat Pavonia and the steamship Breakwater, on the night of December 16th. I was sitting on the lounge in the after part of the pilot-house, and it wasn't my place to say anything, because I was merely a passenger, and we was coming up along the docks and giving it a reasonable berth, and there was vessels on each side of us,

39 and we couldn't go in any closer on account of a tow-boat having some barges, and the first thing I heard they blew a whistle and the captain answered them, and presently they blowed another whistle. The ferry-boat blew one whistle to go to port, and presently he blowed another one, and I sat still in my seat, but I could see the boat coming out, this ferry-boat, and presently he blowed three whistles, and I got up and walked towards the wheel, and I said, "Captain, that fellow has given you three whistles; you want to back all you can," and he said "I am backing all I can." I had heard the bells before that. He was lying perfectly still. The forward end of his beam was down. I said, "Captain, it is his own fault; you ain't to blame at all." I said, "If he had kept his helm hard-a-port and gone out full speed he could have gone up the river, because the ferry-boat would not answer her helm quick, coming out of her slip with slack water. If he had kept her going we might have just given him a glancing blow aft of the after part of his paddle. When she struck us we must have been the next pier below the rack and about two lengths, I suppose, from the docks. She couldn't have been going over four knots just previous to the collision. I think if he had kept the ferry-boat going there wouldn't have been a collision. There was such a tremendous tide going down and blowing heavily and such a wind with his side to it there was nothing to hinder him coming down. I think the steamship backed

in time to have stopped her way entirely before she reached the mouth of that slip.

Q. I know the ferry-boat stopped you. If there had been
40 no ferry-boat in the way would she have stopped before she reached there?

A. Yes, sir; for there was a tremendous tide there. If there hadn't been any ferry-boat there I don't think she would have carried her way over a length.

HENRY BEEBE, a witness for the Breakwater, being duly sworn, testifies:

(Direct:)

I am captain and pilot on the J. B. Schuyler; before that I was assistant pilot on the Fulton ferry. I am quite familiar with the Pavonia ferry. I have been over it a great many times, and am crossing it every day for the last four or five years. The northerly pier of that slip protects the slip from the effects of the ebb tide in a northerly wind. There is sufficient room for a ferry-boat lying in the slip to get sufficient steerage way before reaching the tide. I know the ferry-boat Pavonia. With a strong ebb tide and a fresh northerly wind a ferry-boat like the Pavonia would drop down before she headed across the tide not over seventy-five to a hundred feet. If I had been in command as pilot of the steamboat Pavonia and was about to proceed from New York to Jersey, the tide being strong ebb, running three or four knots an hour, the wind fresh from the north, and I saw down below my slip and about opposite Barclay-street ferry a screw steamer of a thousand tons or upwards and I had started my ferry-boat from the bridge at full speed, it would not have been prudent for me to have slowed after having rung up full speed, because I should drop down the river more. If I had any idea of going ahead of the steamer I should give my boat
41 all the speed I could—that is, if I intended to go ahead of her. If I had started full speed and then slowed when I struck the tide and my head swung down towards the approaching steamer I should certainly have stopped and backed and gone astern of the steamer. If I had been pilot of the Pavonia, bound to Jersey City, and was about to start, but before doing so saw down the river, about opposite Barclay-street ferry-slip, a screw steamer of a thousand tons or more, bound up the river, and at the time the tide being strong ebb, the wind fresh from the north, if I had any doubts of not crossing her I should certainly have laid still in the slip and given the doubt the benefit. I don't think I should have started under those circumstances. I don't think it would be prudent for the ferry-boat Pavonia, having a steamer on her port hand, to start and come out of the slip when such movement might possibly compel the approaching steamer to stop. I would not do it.

(Cross:)

I do not know how far it is from pier 20 to Barclay-street ferry.

Q. You are, as a pilot, familiar with the pilot and inspector's rules?

A. Yes, sir.

Q. And with the rules of navigation?

A. Yes, sir.

Q. By those rules, in respect to a vessel bound up the river and one bound out and across the river, which has the right of way?

A. I should judge the one bound up the river when the other is in the slip.

Q. Supposing the one in the slip was moving out?

A. The one had the right of way going up if the other was just starting to come out.

Q. So you think when two vessels are on crossing courses
42 like that, the one coming up the river and the other going out towards the centre of the river, the one coming up has the right of way?

A. I don't say that.

Q. What is the rule when vessels are on crossing courses, one having the other on her starboard hand; which has the right of way?

A. The one whistle gives the right of way.

Q. But, irrespective of whistles, which has the right of way, the vessel having the other on her starboard hand or the one having the other on her port hand?

A. The one having the vessel on the starboard hand has the right of way.

Q. That is the way you understand the rules, is it?

A. Yes, sir.

Q. In this case you understand the Pavonia was crossing the course of the Breakwater, do you?

A. That is the way I understand it.

Q. And the Breakwater had the Pavonia on the Breakwater's starboard hand?

A. Yes.

Q. And you understand that in that situation the Breakwater had the right of way?

A. Under those circumstances; yes, sir.

Q. In that situation?

A. Under that set of circumstances.

Q. What do you mean by circumstances? Do you mean while the Pavonia was crossing the course of the Breakwater?

A. One is in the river moving up and the other is lying still in the slip and going to start out to get away.

Q. Supposing the Pavonia is already under motion, moving out and crossing the course of the Breakwater, which would have the right of way?

A. She should have the right of way if she had way enough to get there.

43 Q. Which one?

A. The Pavonia.

Q. The Pavonia?

A. If she could get there without running into the other. It would be impossible for the ferry-boat, heading west, to get near the steamship down at Barclay street; she would be nowhere near her unless she stopped and drifted. If the steamship had been going at half speed and had reversed against this strong wind she would have gone ahead her length.

Q. Supposing the ferry-boat to be moving slowly out of the upper slip, going westward, and her bow is as far out as the outer end of pier 20, which is the pier bounding the north slip of this ferry, and she gets a single whistle from a steamer, then about abreast of the Barclay-street ferry-slip, which steamer is four or five hundred feet off from the ends of the New York piers, and is proceeding directly up the river, what do you say would be the proper course for the ferry-boat under those circumstances?

A. I say, if I had any doubts whether I could get by her I would go back into the slip and get out of the way of the steamer coming up. If I was sure I could head her I should answer his signal and go on. If I had any doubts, I shouldn't. I would not obey the signal if I thought it was going to endanger me a collision—I should use my own judgment. I would do that irrespective of whether the pilot of the seteamer had the right of way or not.

Q. Suppose when you got this one whistle the steamer was four hundred feet off the New York docks and abreast or nearly clear of the Barclay-street ferry-slip and you had been pilot of the
44 ferry-boat, would you have stopped or gone ahead?

A. If I had any doubts I couldn't head her I would stay in the slip.

(Redirect:)

Q. Suppose you had been the pilot of the steamer and had any doubts that you could have kept out of the way of the ferry-boat, what would you immediately have done?

A. I would have stopped the ship and backed her and done all I could to avoid the collision. After the ferry-boat had got out from the end of the pier and she swung down towards me, being on the steamer, I should stop and back my ship, as I said before. If the steamer had stopped when the ferry-boat was out by pier 28, heading to the west, and when the ferry-boat came out and struck the tide, so that she headed down towards the steamer, I should judge that the steamer was doing all he could to avoid a collision by backing—that is, all that could be done. If I had been on the ferry-boat after she struck the tide and swung down towards the steamer, I should have stopped her as soon as I could and have gone astern of the steamer, if I couldn't get ahead of her. If the ferry-boat slowed in the slip it would make it very uncertain to go ahead. The more way you can have, the quicker your boat will steer when she strikes the tide—the quicker she will turn up the river with a rudder on her.

(Recross:)

Q. Then you think that the better course for the ferry-boat was to have gone ahead full speed?

A. It would be according to how far in the river the ship was when I came out—how far off from the docks.

Q. Supposing the ship was four or five hundred feet off from the docks and you had got one whistle from her, which
45 you say was a signal for the pilot of the ferry-boat to go ahead, should the pilot of the ferry-boat have gone ahead full speed or not?

A. If I was the pilot of the ferry-boat and got one whistle to go ahead, if I had any doubts that I could get ahead I shouldn't go ahead.

Q. That doesn't answer my question. I will put the question again and see if you can answer it directly. You have, in answer to Mr. Owen's question, stated that the ferry-boat shouldn't have gone ahead under those circumstances; haven't you stated that?

A. Not under those circumstances. She wasn't placed that distance in the river.

Q. The steamer is supposed to be abreast of Barclay-street ferry-slip, her pilot-house being about abreast of the upper slip of the Barclay-St. ferry and four or five hundred feet off from the docks. She gives one whistle to the ferry-boat, which you have already stated was to tell the ferry-boat to go ahead; the ferry-boat's bow then is out about as far as the outer end of what I have termed pier 20. Under those circumstances, do you say it was the duty of the ferry-boat to stop and back or to go ahead at full speed?

A. It would be a good deal according to who blew the first whistle.

Q. The ferry-boat blew the first whistle?

A. The ferry-boat blew the first whistle, and the steamer answers his whistle. That was giving him the right of way to go ahead.

Q. Giving the ferry-boat the right of way?

A. Yes, sir; but it remains for the man to know whether he could go out or not after he had received the answer to his whistle, and if he had any doubts he could get there I should certainly
46 think he should stop and lie in his slip; or, if the Breakwater had blowed the first whistle and the ferry-boat was coming out of the slip, if I were on the ferry-boat and knew that I couldn't cross that ship when he blowed his first whistle I should certainly have laid in the slip with the ferry-boat and answered him two whistles, to let him go past me that way.

Q. Supposing the steamer to be four or five hundred feet off from the New York docks and the ferry-boat was coming out of her upper slip, with her bow at the outer end of pier 20, and the steamer was abreast of the Barclay-street ferry, under those circumstances, if both vessels had kept their courses and speed, do you think there would have been any danger of collision?

A. If the ferry-boat held her course west there would have been no danger if she steered all the time, because she still would keep

coming all the time; but if she dropped below and didn't steer she would drop down the river.

Q. Under these circumstances, if you had been pilot of the steamer, would you or not have made calculations for the ferry-boat if she had been coming slowly out of her slip, she having that strong ebb tide to set her down the river?

A. I couldn't make calculations until I see the position of the ferry-boat—what position she took when she struck the tide.

Q. Then, if you were pilot of the steamer, you would have navigated the steamer regardless of the circumstances of the wind and tide setting the ferry-boat down the river towards you?

A. Why, certainly not; I wouldn't.

Q. Then, you would have made calculations for that?

A. I would know that the ferry-boat would fall down some.

47 Q. Knowing that she would fall down some before you had actually seen the effect of the tide on her, wouldn't you have taken the precautions to reverse your engines and be on the safe side?

A. If I had thought the ferry-boat could go ahead of me I should feel perfectly at rest until the ferry-boat got out, and then I should do all I could to avoid collision.

Q. Now I am going back to this: Would you not have reversed, knowing that the ferry-boat would have been set down on the ebb tide immediately on the exchange of the first whistle, assuming that she was moving slowly out of the slip, and that her bow at that time was even with the outer end of pier 20?

A. Why, I shouldnt't have reversed until I could see which way the boat was coming. If she was to come towards me, of course I should stop and reverse my engines. I couldn't tell. She might go ahead of me.

Q. Wouldn't your experience have told you that the tide would set the ferry-boat down towards you?

A. Why, certainly; I say so, but I couldn't tell you how far.

Q. Then with the uncertainty as to how far the tide would set the ferry-boat down, whether a hundred feet or a quarter of a mile, you would have continued on without reversing?

A. Under the circumstances, I should have known after she got out whether she was coming towards me or not.

Q. But your experience as a pilot would have indicated to you that she would be set down some with the tide?

A. Why certainly; I say so.

Q. Then wouldn't it be prudent for you to reverse?

A. As soon as I found out that she couldn't get clear of me.

Q. Then you wish the court to understand that you swear

48 as an expert that, with full knowledge that the ebb tide would set the ferry-boat down towards you, you would have waited until you actually saw the effect of the ebb tide on the ferry-boat before you reversed?

A. That depends on how close we would be to the ferry.

Q. It has been assumed that the ferry-boat was coming out of the

Chambers-St. slip and the Breakwater was abreast of Barclay-street ferry.

A. I couldn't reverse until I knew that he couldn't get there. If I thought he could get ahead of me, there would be no occasion for me to stop.

Q. Suppose you thought he couldn't?

A. If I had any doubts about it I should stop and back as fast as I could.

Q. That would be prudent navigation?

A. It would be prudent for any man, if he had any doubts, to save a collision and do all he could.

Q. It would be very imprudent navigation not to stop if you had any doubt?

A. If I had any doubt at all that he couldn't, I should not think it prudent to go ahead.

(Recross:)

Q. Then do you say that your knowledge as a pilot would not have told you it was possible that he couldn't get there when you knew that the tide had had the effect of setting ferry-boats from Chambers-street slip down below Barclay-street slip?

A. Under those circumstances I should stop my ship and back her and do all I could to avoid a collision. If I am right in from sea I wouldn't be aware of as much about the tide as I should be if I was right there all the time; and if I saw the ferry-boat there I should defer to the judgment of the pilot of the ferry-boat and know that he would understand the effect and set of the tide better than I.

49 SILAS B. BALDWIN, a witness for the Breakwater, being duly sworn, testifies:

(Direct:)

I am a steamboat pilot and have been such for 34 years, more or less, principally on the East river. About four years of that time I was pilot on the North river.

Q. Have you had occasion to know the Pavonia slip?

A. I have on two or three occasions been in that slip on the New York side.

Q. So that you know that slip?

A. Somewhat acquainted with it; yes, sir.

Q. The northerly side of that pier protects the slip from the tide and wind, doesn't it?

A. I believe that is the longer pier.

Q. And is there not sufficient room for the ferry-boat to get good headway before reaching the tide?

A. Where?

Q. From the bridge.

A. I should say there was. I should think there was over a hundred feet from the outer end of the slip to the ferry-boat's bow. With a strong ebb tide, running three or four knots, and a fresh northerly wind, the ferry-boat Pavonia, coming out with full head-

way from that slip, her helm being hard-a-port, ought not to set down the river more than a hundred and fifty feet.

Q. Suppose that before the ferry-boat left the bridge, when the pilot was going from the New York end pilot-house to the Jersey end pilot-house, he looked down the river and saw a steamer of a thousand tons and upwards four or five hundred feet off the docks and about abreast of the Barclay-street ferry, coming up the
50 river, perhaps a little bit below Barclay-street ferry at that time, what do you say as to whether or not it was prudent for her at that time to have started out?

A. If I had started from the bridge I should have stopped. If I were in there and hadn't started from the bridge at all I would not have started. If I had started and had seen the steamer down the river, if I had any doubts about clearing her at all, I should have backed into the slip again; I wouldn't have gone out at all.

Q. Suppose at the time the ferry-boat reaches the outer end of the northerly pier—that is, her Jersey end just reaches it—then signals are exchanged, and at that time the ferry-boat is heading westward and the steamer is then down about off Barclay-street ferry, assuming that the ferry-boat was then going at full speed, in your judgment was there anything to prevent those vessels from passing one another?

A. Do I understand that the ferry-boat was hooked up?

Q. Yes; she had full speed.

A. I don't see, if the steamer was down at Barclay street, how she could have reached her if the ferry-boat had kept hooked up. If at that time the steamer, seeing the ferry-boat in that position, heading to the westward, had stopped, I should certainly have called that prudent navigation on the part of the steamer. If I saw that there was any danger of the ferry-boat dropping down across my course, I should have sent down the back bells, if she fell off enough for that. At the time the ferry-boat's bow gets clear of the pier so as to strike the ebb tide and swings down towards the steamer I should have backed, of course. That would certainly be the first time I would back. You would have to wait for develop-
51 ments to see what you would do. Being in command of the ferry-boat, if, when I had left my bridge, having seen the steamer below before that, and having rung full speed ahead, and judging that by keeping full speed ahead I would have cleared her, I would not have slowed. After having rung full speed ahead on the ferry-boat and seeing the steamer below I would not have slowed if I had no doubt about clearing her.

Q. If you had done anything at all you would have stopped?

A. Either have gone ahead full speed or backed into the slip. At the time my bow struck the tide and swung down toward the steamer, seeing I couldn't have gone ahead of the steamer, I should have stopped and backed and gone inside of her.

(Cross:)

Q. Assuming that the ferry-boat was two hundred feet long, and she heads to the westward, having the wind and tide on her star-

board side to set her down the river, and she is going slowly, do you say that it would be impossible for that ferry-boat to be set down four hundred feet below her ferry-slip before her stern cleared the outer end of her slip or the pier just below her slip, four hundred feet?

A. In order to bring that boat four hundred feet below her slip before her stern clears the outer pier she would have to come ahead directly down the river to do it.

Q. Would you or not, if you had been pilot of a steamer proceeding up the North river, and being about abreast of Barclay-street ferry and within four or five hundred feet out in the river, and seeing a ferry-boat moving slowly out of her Chambers-street
52 ferry slip, going towards her Jersey slip, have made any calculation as to the effect of the ebb tide setting the ferry-boat down on your course?

A. If I had just come from sea perhaps I might not so well be conversant with the tide as that man on the ferry-boat, but I should have stopped my boat, of course; if I had seen the ferry-boat moving out of her slip I should have stopped my boat.

Q. You think it would have been prudent to have stopped the headway of your steamer?

A. I do; yes, sir.

—. Were there any signals exchanged at this time?

Q. No.

Q. Supposing no signals had been exchanged, what would you have done if she was just moving from the bridge?

A. The probabilities are that I would have kept on until he gave me a signal or something, I coming in from sea, of course.

Q. Then, when he signalled?

A. I should have stopped my boat, of course.

The counsel for the Breakwater and Pavonia also put in the following requests to find:

Proposed Findings of Fact and Conclusions of Law on the Part of The New York, Lake Erie and Western Railroad Company, Appellee.

Findings of fact.

First. The steam ferry-boat Pavonia and the steamship Breakwater, owned respectively by the New York, Lake Erie and Western Railroad Company and the Old Dominion Steamship Com-
53 pany, collided at about 4.50 o'clock in the afternoon of the 16th day of December, 1887, in the North river, about abreast of the middle of the slip, between the pier known as the Fall River pier, 28 (old number), and the Providence pier 29, (old number), and about 400 feet out in the river from the ends of said piers.

Second. Immediately adjacent to said pier 29 and to the northward thereof there were two slips of the Erie ferry operated by the said New York, Lake Erie and Western Railroad Company. The northerly of said ships was bounded by pier known as No. 20 (new

number), which was the first pier above said pier 29, and extended out in the river about 150 feet further than pier 29 and piers below.

Third. Shortly before the collision the ferry-boat left the upper slip of the said ferry on one of her regular trips bound to New Jersey or Pavonia slip of the said ferry.

The steamship at this time was about off Barclay street on one of her regular trips from sea to her berth at the foot of Beach street.

Fourth. The tide was strong ebb, the wind from the northward and westward, and the weather clear.

Fifth. The ferry-boat started to move slowly out of her slip under a hard-a-port wheel, which was fastened in the becket and so remained until the time of the collision.

As her bow emerged the effect of the wind and tide was to swing the bow somewhat down the river, but this swing was overcome before the collision, when her bow was on a swing up the river. The wind and tide had the effect also to set the ferry-boat bodily down the river, but the set had been overcome at the time of the collision.

54 The course of the ferry-boat from the time of starting until the collision was the usual course of ferry-boats on leaving the said slip under like circumstances.

The course of the steamship from the vicinity of the Battery was close along the New York docks. As she neared the Cortlandt-street ferry-slip she approached closer to the docks, and from that time continued on a course about 400 feet therefrom, which distance was maintained until the collision.

Sixth. The ferry-boat sounded the usual long whistle to warn approaching vessels as she commenced to move out of her slip.

Shortly thereafter the steamship sounded a single whistle to the ferry-boat, at which time the ferry-boat was moving slowly, her bow having reached about the outer end of pier 20. The ferry-boat immediately replied to the said whistle by a single whistle. The ferry-boat, when her stern was about as far as the outer end of pier 20, sounded another single whistle to the steamship, which was answered by a like single whistle by the steamship. Before the collision the ferry-boat sounded alarm whistles.

Seventh. Immediately on receiving the first whistle from the steamship the engines of the ferry-boat were put to full speed ahead, and so continued until the time of collision.

Eighth. The steamship's speed at the time of sounding her first whistle was about six miles an hour, which was continued until very close to the point of collision and until it was too late, by stopping or reversing, to avoid the collison.

55 Ninth. From the time of the first exchange of the signal whistles between the two vessels up to the time of collision the ferry-boat had moved down the river from her slip about 250 feet and the steamship up the river over 600 feet.

Tenth. The stem of the steamship struck the Pavonia on the latter's port side a little abaft her wheel, cut through her guard into the hull, and the ferry-boat was thereby seriously damaged.

Eleventh. If the engines of the steamship had been promptly re-

versed her headway could have been stopped entirely in going her length of 212 feet.

Twelfth. If her engines had been promptly reversed at the time of the first exchange of whistles the collision would have been avoided.

Thirteenth. The libellant and appellee, The New York, Lake Erie and Western Railroad Company, suffered damages by reason of the collision as follows, viz:

Repairs to the said ferry-boat paid on the 24th day of May, 1888	$4,770 02
Demurrage	2,800 00

Conclusions of Law.

First. The steamship was in fault.

A. Having the ferry-boat on her own starboard side and being upon a crossing course, in not keeping out of the way of the ferry-boat.

B. In not taking into consideration the probable and usual
56 course of ferry-boats departing from said slip under the circumstances of the tide and wind.

C. In keeping so close to the New York docks and mouths of the ferry slips.

D. In proceeding at the rate of speed she did.

E. In not changing her course after her one whistle.

F. In not reversing her engine at the time of her first whistle.

Second. The ferry-boat was without fault.

Third. A. In the first above-mentioned action The New York, Lake Erie and Western Railroad Company, libellant and appellee, is entitled to recover against The Old Dominion Steamship Company, claimant and appellant, its damages by reason of said collision as follows, viz: For repairs to the said ferry-boat, amounting to $4,770.02, with interest from the 24th day of May, 1888; for demurrage, the sum of twenty-eight hundred dollars; the costs of the district court, taxed at the sum of $159.75, and the costs of this court, to be taxed.

B. In the second above-mentioned action the libel of The Old Dominion Steamship Company, libellant and appellant, is dismissed, and The New York, Lake Erie and Western Railroad Company, claimant and appellant, is entitled to recover against the said Old Dominion Steamship Company the sum of $41.95, its costs as taxed in the district court, and the costs of this court, to be taxed.

WILCOX, ADAMS & MACKLIN,
Proctors for the New York, Lake Erie and Western Railroad Co.

FRANKLIN A. WILCOX, *Advocate.*

57 *Findings of Fact and Conclusions of Law on Behalf of the Appellants, The Old Dominion Steamship Company.*

Findings of fact.

First. That between 4½ and 5 o'clock on the afternoon of the 16th day of December, 1887, a collision occurred in the Hudson river, a little above pier 28, between the steamer Breakwater and the ferry-boat Pavonia.

Second. The Breakwater is an iron steamer of 1,100 tons burden and 212 feet long. Before and at the time of the collision her master, chief officer, quartermaster, and a Sandy Hook pilot were in the pilot-house. A competent lookout was stationed forward. The second officer was on the forward deck in front of the wheel-house.

Third. The Breakwater had come in from sea and was bound up the river to her dock at the foot of Beach street, a short distance above Chambers-street ferry, and the Pavonia was bound across the river from the foot of Chambers street, New York, to the Erie depot, at Jersey City, to the northward of Chambers street, and her course was up the river away from the Breakwater.

Fourth. The tide was an unusually strong ebb, and the wind was blowing strong from about northwest, the effect of which would be, unless guarded against, to set the Pavonia down the river below her slip to an unusual extent. The Pavonia had made several trips previous to this, and her pilot knew the effect of the tide and wind.

58 Fifth. The Breakwater's position was such when first seen that it was dangerous for the Pavonia to attempt to leave her slip across the Breakwater's bows.

Sixth. When the Breakwater had reached pier 1, North river, her speed was reduced from full speed, which was between ten and twelve knots an hour, to between seven and eight through the water or four or five by the land. When about off Cortlandt street she hauled in nearer to the New York docks, her usual custom, in order to make a proper landing, and proceeded up at a distance of from 400 to 500 feet from the ends of the piers.

Seventh. Ahead of the Breakwater and between her and the New York docks the tug Nonpareil was proceeding up the river at a little slower rate of speed, having in tow on a hawser 120 feet long two barges, each about 90 feet long and connected by a hawser of 50 feet long. Another tug, the Wyoma, was proceeding up the river between the Breakwater and the New York shore at about the same rate of speed as the Breakwater and off the Breakwater's starboard quarter. The tug Kearney, with a lighter in tow, was also proceeding up the river off her port quarter, all the time gaining upon the Breakwater.

Eighth. The distance from the upper rack of the Chambers-street ferry to the upper side of the pier immediately above Barclay street is 881½ feet. The upper slip of Chambers-street ferry is 87½ feet wide and the whole slip is 200 feet wide. The distance from the upper rack of the slip to the place of collision is 400 feet.

Ninth. The Pavonia was lying in the upper slip at
59 Chambers street and was about to start when her pilot saw the Breakwater off Barclay-street ferry coming up the river. After starting from her bridge and while running towards the end of the northerly rack the Pavonia gave one blast of her whistle, and immediately the Breakwater answered with one blast of her whistle. At this time the Pavonia was inside her rack and the Breakwater's stem was clear of Barclay-street ferry.

Tenth. When the Pavonia had got partly out from the end of her upper rack her head, instead of turning up the river, swung down, and she gave one blast of her whistle, and this signal was immediately answered by one from the Breakwater. At this time the stem of the latter vessel was a little above pier 27.

Eleventh. After the Pavonia had got entirely out of her slip she swung down more towards the Breakwater and gave another signal of one blast of her whistle, which was answered by one from the Breakwater, and immediately prior to the collision the Pavonia blew alarm signals, the collision taking place while such signals were being sounded.

Twelfth. As soon as the Breakwater sounded her first whistle her engines were immediately stopped, and when the Pavonia had got partly out from the end of her upper rack and her head swung down the river, at which time she sounded her second whistle, the Breakwater's engines were immediately put full speed astern.

Thirteenth. The Pavonia, upon leaving the slip, started at full speed, but before reaching the end of the rack slowed, and
60 after clearing the rack and when pointing down towards the Breakwater rang up full speed and continued on at full speed until after the collision happened.

Fourteenth. That if the Pavonia, after starting, had continued at full speed she would have overcome the effect of the wind and tide and headed more directly across the tide instead of heading down to and towards the Breakwater, and the collision would have been prevented.

Fifteenth. That if the Pavonia, at the time her head swung down towards the Breakwater, had reversed, the collision would have been prevented.

Sixteenth. That the Pavonia's wheel was not put to port, as it should have been, in coming out of the slip.

Seventeenth. When the Breakwater gave her first signal there was no reason to apprehend danger of collision, and her stopping at that time was a measure of prudence and extra precaution. The known course of the Pavonia was up the river and away from the Breakwater, and the latter had no reason to believe that the Pavonia would be permitted to come down the river, so as to render danger of collision imminent.

Eighteenth. When the Breakwater's first whistle was sounded the Pavonia was in safety within her slip, where she could have remained and avoided all danger.

Nineteenth. That as soon as danger of collision was imminent

the Breakwater's engines were put full speed astern and her headway entirely stopped.

Twentieth. That the Pavonia swung down the river about 350 feet.

61 Twenty-first. That the movements of the Pavonia were constantly watched by those in charge of the Breakwater.

Conclusions of Law.

First. The Pavonia was in fault for starting from her slip after seeing the Breakwater coming up the river.

Second. The Pavonia was chargeable with knowledge that the wind and tide would set her down upon the Breakwater, and therefore she was in fault for starting from her pier as she did.

Third. The Pavonia was in fault for not keeping up her full speed, after having started, to overcome the tide and wind.

Fourth. The Pavonia was in fault for not reversing as soon as her head swung down towards the Breakwater.

Fifth. The Pavonia was in fault for not putting her helm hard-a-port when she started out.

Sixth. That the Breakwater was carefully navigated and was in no manner responsible for the collision.

Seventh. That as soon as the Breakwater heard the Pavonia's first signal she promptly stopped, which was all she was then required to do.

Eighth. That as soon as danger of collision was imminent the Breakwater immediately reversed, thereby complying with all the requirements of the law.

Ninth. That the Breakwater did everything which she was required to do in order to prevent collision.

62 Tenth. The starboard-hand rule does not apply in this case.

Eleventh. That the Breakwater, having just arrived from sea, was not chargeable with knowledge of the effect of the wind and tide.

Twelfth. That the Breakwater had the right to assume that in starting from the slip the Pavonia could and would safely cross her bow without requiring the Breakwater at once to reverse at full speed.

Thirteenth. That the Pavonia was in fault for starting and continuing under such circumstances and in such manner as might require the Breakwater to reverse at full speed.

Fourteenth. That the decrees of the district court dismissing the libel against the Pavonia and holding the Breakwater at fault for the collision should be reversed, with costs of the district and circuit courts.

OWEN, GRAY & STURGES,
Proctors for App'l'ts.

Thereafter and on or about the 5th day of July, 1890, the said circuit justice filed certain findings and his opinion as follows:

1. The steam ferry-boat Pavonia, owned by the New York, Lake Erie and Western Railroad Company, and the steamship Breakwater, owned by the Old Dominion Steamship Company, collided with each other at or about 4.50 o'clock p. m. on the 16th day of December, 1887, in the North River, about abreast of the middle of the slip between pier 28 (old number), known as the Fall River
63 pier, and pier 29 (old number), known as the Providence pier, and about 400 feet out in the river from the ends of those piers.

2. Immediately adjacent to pier 29 (old number) and to the northward thereof there were two slips of the Pavonia or Erie ferry, which was operated by the New York, Lake Erie and Western Railroad Company. The more northerly of those slips was bounded on the north by a pier known as No. 20 (new number), which was the first pier to the north of pier 29 (old number), and extended out into the river about 150 feet further than pier 29 (old number) and the piers below it. Those slips were at the foot of Chambers street.

3. Shortly before the collision the Pavonia left her upper or northerly slip, on the New York city side, on one of her regular trips, bound to her slip across the river in New Jersey, which latter slip was to the northward of Chambers street.

4. The distance from the upper or northerly rack of the slips at Chambers street to the upper or northerly side of the pier at Barclay street, which was the fourth street south of Chambers street, was 881½ feet. The upper slip at Chambers street was 87½ feet wide; the whole slip was 200 feet wide.

5. At the time the Pavonia left her bridge the Breakwater was about off Barclay street, coming in from sea on one of her regular trips to her berth at the foot of Beach street, which was to the north of Chambers street.

6. The tide was strong ebb, the wind was northwest, and the weather was clear.

7. The Pavonia started to move slowly out of her slip
64 under a hard-a-port wheel, which was fastened in the becket, and so remained until the collision. As her bow emerged the effect of the wind and tide was to swing her bow somewhat down the river, but this swing was overcome before the collision, at which time her bow was on a swing up the river. The wind and tide had the effect also to set her bodily down the river. Her course, from the time of her starting until the collision, was the usual course of ferry-boats on leaving their slips under like circumstances. The course of the Breakwater from the vicinity of the Battery was along the New York docks. As she neared the Cortlandt-street ferry-slip she approached closer to the docks, and from that time continued on a course about 400 feet therefrom.

8. The Pavonia sounded the usual long, single whistle to warn approaching vessels as she commenced to move. Shortly thereafter the Breakwater sounded in reply a single whistle, at which time the Pavonia was moving slowly, her bow having reached about the outer end of pier 20 (new number). The Pavonia immediately

replied by a single whistle, which was answered by a single whistle from the Breakwater. The Pavonia, when her stern was about as far out as the outer end of pier 20 (new number), sounded another single whistle to the Breakwater, which was answered by the Breakwater by a single whistle. Before the collision the Pavonia sounded alarm whistles.

8. As soon as the Pavonia received the first whistle from the Breakwater her engine was put to full speed ahead, and so continued until the collision. As soon as the Breakwater sounded
65 her first whistle her engine was immediately stopped, and when the Pavonia sounded her second whistle the engine of the Breakwater was immediately put full speed astern.

9. The speed of the Breakwater at the time she sounded her first whistle was about six miles an hour, but at the time of the collision her headway by the land was almost entirely, if not quite, stopped.

10. The stem of the Breakwater struck the Pavonia on the port side of the latter a little abaft her wheel, cut through her guard into her hull, and the Pavonia was thereby seriously damaged.

11. If the engine of the Breakwater had been promptly reversed when she blew her first whistle her headway could have been entirely stopped in going her length of 212 feet and the collision would have been avoided.

12. The New York, Lake Erie and Western Railroad Company suffered damages by reason of the collision as follows, viz: Repairs to the Pavonia, $4,770.02, with interest from February 1st, 1888; demurrage, $2,800, with interest from June 18th, 1889.

On the foregoing facts I find the following conclusions of law:

1. The Breakwater was in fault because, having the Pavonia on her own starboard side and being on a crossing course, she did not keep out of the way of the Pavonia, and in not taking into consideration the probable and usual course of the Pavonia under the circumstances of the tide and the wind, and in not reversing her engine at the time she gave her first whistle.

66 2. The Pavonia was without fault.

3. In the suit brought by the New York, Lake Erie and Western Railroad Company, it is entitled to a decree for $4,770.02, with interest from February 1st, 1888, and for $2,800, with interest from June 18th, 1889, and for its costs in the district court, taxed at $159.75, and for its costs in this court, to be taxed.

4. In the suit brought by the Old Dominion Steamship Company a decree must be entered dismissing the libel and awarding to the New York, Lake Erie and Western Railroad Company its costs in the district court, taxed at $41.95, and its costs in this court, to be taxed.

SAMUEL BLATCHFORD,
Circuit Justice.

Thereupon, and on the 9th day of July, 1890, the counsel for the Breakwater filed exceptions to said findings as follows:

The appellant, The Old Dominion Steamship Company, owner and claimant of the steamship Breakwater, hereby excepts to the

findings of fact and conclusions of law found by Hon. Samuel Blatchford herein, as follows:

I. The appellant hereby excepts to so much and such part of the first finding of fact as states and finds that the collision occurred "about abreast of the middle of the slip between pier 28 (old number), known as the Fall River pier, and pier 29 (old number), known as the Providence pier," on the ground and for the reason that the evidence does not support such finding.

67 II. The appellant hereby excepts to so much and such part of the seventh finding of fact as states and finds that "the Pavonia started to move slowly out of her slip under a hard-a-port wheel, which was fastened in the becket, and so remained until after the collision," and that "her course from the time of her starting until the collision was the usual course of ferry-boats on leaving their slips under like circumstances," on the ground and for the reason that the evidence does not support the same.

III. The appellant hereby excepts to so much and such part of the eighth finding of fact as states and finds that "the Pavonia sounded the usual long single whistle to warn approaching vessels as she commenced to move. Shortly thereafter the Breakwater sounded in reply a single whistle, at which time the Pavonia was moving slowly, her bow having reached about the outer end of pier 20 (new number)," and that "as soon as the Pavonia received the first whistle from the Breakwater her engine was put to full speed ahead," on the ground and for the reason that the evidence does not support the same.

IV. The appellant hereby excepts to so much and such part of the ninth finding of fact as states and finds that "the speed of the Breakwater at the time she sounded her first whistle was about six miles an hour," on the ground and for the reason that the evidence does not support the same.

V. The appellant hereby excepts to the eleventh finding of fact on the ground and for the reason that the evidence does not support the same.

68 VI. The appellant hereby excepts to the first, second, third, and fourth conclusions of law and to each of said conclusions on the ground and for the reason that the evidence does not support the same.

OWEN, GRAY & STURGES,
Proctors for Appellant, The Old Dominion Steamship Company.

Thereupon the counsel for the Breakwater presented to the court the following additional requests to find as follows:

Findings of Fact.

First. That between 4½ and 5 o'clock on the afternoon of the 16th day of December, 1887, a collision occurred in the Hudson river, a little above pier 28, between the steamer Breakwater and the ferry-boat Pavonia.

The court having refused to make such finding, counsel for the Breakwater duly excepted.

Second. The Breakwater is an iron steamer of 1,100 tons burden and 212 feet long. Before and at the time of the collision her master, chief officer, quartermaster, and a Sandy Hook pilot, who was only a passenger, were in her pilot-house. A competent lookout was stationed forward; the second officer was on the forward deck in front of the wheel-house.

69 The court having allowed said finding, except that it refused to find that a "competent lookout was stationed forward," the counsel for the Breakwater duly excepted.

Third. The course of the Pavonia was up the river away from the Breakwater.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Fourth. The effect of the wind and tide would be, unless guarded against, to set the Pavonia down the river below her slip to an unusual extent. The Pavonia had made several trips previous to this, and her pilot knew the effect of the wind and tide.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Fifth. The Breakwater's position was such when first seen that it was dangerous for the Pavonia to attempt to leave her slip across the Breakwater's bow.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Sixth. When the Breakwater had reached pier 1, North river, her speed was reduced from full speed, which was between ten and twelve knots an hour, to between seven and eight through the water or four or five by the land. When about off Cortlandt street she hauled in nearer to the New York docks, her usual custom, in order to make a proper landing, and proceeded up at a distance of from 400 to 500 feet from the ends of the piers.

70 The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Seventh. Ahead of the Breakwater and between her and the New York docks the tug Nonpaeril was proceeding up the river at a little slower rate of speed, having a tow on a hawser 120 feet long, two barges, each about 90 feet long, and connected by a hawser of 50 feet long. Another tug, the Wyoma, was proceeding up the river, between the Breakwater and the New York shore, at about the same rate of speed as the Breakwater and off the Breakwater's starboard quarter. The tug Kearney, with a lighter in tow, was also proceeding up the river off her port quarter, all the time gaining upon the Breakwater.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Eighth. The distance from the upper rack of the slip of the Chambers-street ferry to the place of collision is 400 feet.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Ninth. The Pavonia was lying in the upper slip at Chambers street, and was about to start when her pilot saw the Breakwater off Barclay-street ferry coming up the river. After starting from her bridge and while running towards the end of the northerly rack the Pavonia gave one blast of her whistle, and immediately the Breakwater answered with one blast of her whistle. At this time
71 the Pavonia was inside her rack, and the Breakwater's stem was clear of Barclay-street ferry.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Tenth. When the Pavonia had got partly out from the end of her upper rack her head, instead of turning up the river, swung down, and she gave one blast of her whistle, and this signal was immediately answered by one from the Breakwater. At this time the stem of the latter vessel was a little above pier 27.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Eleventh. After the Pavonia had got entirely out of her slip she swung down more towards the Breakwater and gave another signal of one blast of her whistle, which was answered by one from the Breakwater, and immediately prior to the collision the Pavonia blew alarm signals, the collision taking place while such signals were being sounded.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Twelfth. As soon as the Breakwater sounded her first whistle her engines were immediately stopped, and when the Pavonia had got partly out from the end of her upper rack and her head swung down the river, at which time she sounded her second whistle, the Breakwater's engines were immediately put full speed astern.
72 The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Thirteenth. The Pavonia upon leaving the slip started at full speed, but before reaching the end of the rack slowed, and after clearing the rack and when pointing down toward the Breakwater rang up full speed and continued on at full speed until after the collision happened.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Fourteenth. That if the Pavonia after starting had continued at full speed she would have overcome the effect of the wind and tide and headed more directly across the tide instead of heading down to and towards the Breakwater, and the collision would have been prevented.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Fifteenth. That if the Pavonia at the time her head swung down towards the Breakwater had reversed the collision would have been prevented.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Sixteenth. That the Pavonia's wheel was not put to port, as it should have been, in coming out of the slip.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

73 Seventeenth. When the Breakwater gave her first signal there was no reason to apprehend danger of collision, and her stopping at that time was a measure of prudence and extra precaution. The known course of the Pavonia was up the river and away from the Breakwater, and the latter had no reason to believe that the Pavonia would be permitted to come down the river so as to render danger of collision imminent.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Eighteenth. When the Breakwater's first whistle was sounded the Pavonia was in safety within her slip, where she could have remained and avoided all danger.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Nineteenth. There was no danger of collision until the Pavonia commenced to swing down towards the Breakwater, at which time she sounded her second whistle. The Breakwater answered said whistle and her engines were reversed at full speed.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Twentieth. That the Pavonia swung down the river about 350 feet.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Twenty-first. That the movements of the Pavonia were
74 constantly watched by those in charge of the Breakwater.

The court having refused to make such finding, the counsel for the Breakwater duly excepted.

Conclusions of Law.

First. The Pavonia was in fault for starting from her slip after seeing the Breakwater coming up the river.

The court having refused to find such conclusion of law, the counsel for the Breakwater duly excepted.

Second. The Pavonia was chargeable with knowledge that the wind and tide would set her down upon the Breakwater, and therefore she was in fault in starting from her pier as she did.

The court having refused to find such conclusion of law, the counsel for the Breakwater duly excepted.

Third. The Pavonia was in fault for not keeping up her full speed after having started to overcome the tide and wind.

The court having refused to find such conclusion of law, the counsel for the Breakwater duly excepted.

pany, the claimant of the steamship "Breakwater," hereby appeals from the final decree entered in this action on the 29th day of September, 1890, and from the whole and every part thereof, to the Supreme Court of the United States of America.

Dated September 30, 1890.

Yours, &c., OWEN, GRAY & STURGES,
Proctors for Old Dominion S. S. Company,
Claimant & Appellant.

To Messrs. Wilcox, Adams & Macklin, proctors for libellant & appellee; B. Lincoln Benedict, Esq., clerk.

Endorsed: Notice of appeal. Filed October 8, 1890.

80 Supreme Court of the United States.

THE STEAMSHIP "BREAKWATER," HER ENGINES, &c., THE OLD DOMINION STEAMSHIP COMPANY, Claimant & Appellant,
ads.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Libellant & Appellee.

To the honorable the justices of the Supreme Court of the United States:

The appeal of the Old Dominion Steamship Company, owner and claimant of the steamship "Breakwater," her engines, &c., respectfully shows—

That on or about the 20th day of December, 1887, the New York Lake Erie and Western Railroad Company filed its libel against the steamship "Breakwater," her engines, &c., in the district court of the United States within and for the eastern district of New York to recover the sum of six thousand five hundred dollars in a cause of collision.

That thereafter this appellant duly appeared in said action and filed the usual claim and stipulations for costs and value on behalf of said steamship "Breakwater," and on or about the 6th day of March, 1888, duly filed its answer to said libel.

That upon the issue so joined such proceedings were had that on or about the 19th day of June said district court made a decree in favor of the libellant and against the said steamship "Break-
81 water" for the sum of eight thousand one hundred and twenty-five $\frac{68}{100}$ ($8,125.68) dollars.

That thereupon this appellant duly appealed from the said final decree of the district court to the circuit court of the United States for the eastern district of New York, and such proceedings were had upon said appeal as resulted in a final decree of the said circuit court, made and entered on the 29th day of September, 1890, affirming the decree of the district court with the costs of said circuit court, amounting in all to the sum of eight thousand seven hundred and sixty-eight dollars and eighty-five cents ($8,765.85).

That this appellant is advised and verily believes that said de-

cree of said circuit court is erroneous and should be reversed, and the libel herein dismissed with costs to this appellant.

Wherefore this appellant appeals from the whole of said decree of the circuit court of the United States for the eastern district of New York, and respectfully prays that the said decree, the pleadings, proceedings, and such portions of the depositions and evidence in the said cause as are proper may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and each and every part thereof may be reversed and a decree made in favor of this appellant dismissing the libel therein.

And this appellant will ever pray, &c.,

Dated October 3rd, 1890.

OWEN, GRAY & STURGES,
Proctors for the Old Dominion S. S. Co.,
Claimant & Appellant.

The above appeal is hereby allowed.

E. HENRY LACOMBE.

82 Endorsed: Petition of appeal. Filed October 8, 1890.

83 U. S. Circuit Court, Eastern District of New York.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY
vs.
THE STEAMSHIP "BREAKWATER," HER ENGINES, ETC.

Bond for Damages and Costs.

Know all men by these presents that we, The Old Dominion Steamship Company, appellant, and American Surety Company of New York, are held and firmly bound unto the above-named New York, Lake Erie & Western Railroad Company in the sum of four thousand five hundred dollars, to be paid to the said New York, Lake Erie & Western Railroad Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, jointly and severally, firmly by these presents. Sealed with our seals and dated the second day of October, in the year of Lord one thousand eight hundred and ninety.

Whereas the above-named Old Dominion Steamship Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Old Dominion Steamship Company shall prosecute said appeal to effect and answer all damages and costs if it shall

fail to make said appeal good, then this obligation shall be
84 void; otherwise the same shall be and remain in full force and virtue.

THE OLD DOMINION STEAMSHIP COMPANY,
By W. H. STANFORD, *V. P.*

Sealed and delivered and taken and acknowledged this 2nd day of October, 1890, before me—
This 3rd day of October as to the Old Dominion S. S. Co.
[L. S.] ASA F. SMITH,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

H. G. HINTON, as to Am. S. Co.

[L. S.] AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKELS, *2nd Vice-President.*
FRED. F. NUGENT, *Secretary.*

The foregoing bond is hereby approved, October 3, 1890.
E. HENRY LACOMBE.

The foregoing bond is hereby approved as to form, amount, and sufficiency of surety.

WILCOX, ADAMS & MACKLIN,
Proc's for Appellee.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this 2nd day of October, 1890, before me personally appeared David B. Sickels, 2nd vice-president of the American Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the 2nd vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as 2nd vice-president
85 of said company by like authority, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 486, of the Session Laws of 1881; and the said David B. Sickels further said that he was acquainted with Fred. F. Nugent and knew him to be the secretary of said company; that the signature of said Fred. F. Nugent subscribed to the said instrument is in the genuine handwriting of the said Fred. F. Nugent and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said David B. Sickels, 2nd vice-president.

[L. S.] H. G. HINTON,
Notary Public, Kings County, N. Y.

Certificate filed in N. Y. Co.

At a meeting of the board of directors of the American Surety Company, held at the office of the company on the 9th day of June, 1886, on motion, it was

"Resolved, That in pursuance of chapter 416, Laws of 1886, amending section eight hundred and eleven of the Code of Civil Procedure, the president or vice-president be, and either of them is hereby, authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for or on behalf of the company and to attach thereto the seal of the company, the same to be attested by the secretary or assistant secretary."

CITY AND COUNTY OF NEW YORK, *ss:*

I, Frederick F. Nugent, secretary of the American Surety
86 Company, have compared the foregoing resolution with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 2nd day of October, 1890.

[L. S.] FRED. F. NUGENT, *Secretary.*

Endorsed: Bond on appeal. Filed October 8, 1890.

87 UNITED STATES OF AMERICA, *Eastern District of New York,* } *ss:*

THE NEW YORK, LAKE ERIE AND WESTERN R. R. Co.
vs.
THE STEAMSHIP "BREAKWATER."

I, B. Lincoln Benedict, clerk of the circuit court of the United States for the eastern district of New York, in the second judicial circuit, do hereby certify that the foregoing pages, numbered from one to eighty-six, inclusive, contain a true and complete transcript of the original bill of exceptions, final decree, notice of appeal, petition of appeal, and bond on appeal in the above-entitled cause on file and remaining of record in my office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, this 11th day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

The Seal of the Circuit Court, Eastern District of New York.

B. LINCOLN BENEDICT, *Clerk.*

88 By the honorable one of the judges of the circuit court of the United States for the eastern district of New York.

To the New York, Lake Erie and Western Railroad Company:

Whereas the Old Dominion Steamship Company, claimant of the steamship "Breakwater," has lately appealed to the Supreme Court

of the United States from a decree lately rendered by the circuit court of the United States, in the second circuit, in favor of you and against the steamship "Breakwater" and the said Old Dominion Steamship Company and has given the security required by law, you are hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, on the second Monday of October, A. D. 1890, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, in the city of Brooklyn, in the eastern district of New York and the second circuit, this 3rd day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

E. HENRY LACOMBE.

[Endorsed:] U. S. circuit court, eastern district of New York. The New York, Lake Erie & Western Railroad Company *vs.* The Steamship "Breakwater," &c. Citation. Owen, Gray & Sturges, pro's for appellant, 71 Wall street, New York city. Due and timely service of the within citation is hereby admitted. N. Y., Au. 3, 1890. Wilcox, Adams & Macklin, proc's appellee

[Endorsed:] U. S. Supreme Court. New York, Lake Erie and Western R. R. Co. *vs.* Steamship Breakwater, &c. Record.

Endorsed on cover: E. New York C. C. U. S. No. 1554. The Steamship "Breakwater," her engines, &c., The Old Dominion Steamship Company, claimant, appellant, *vs.* The New York, Lake Erie & Western Railroad Company. Filed November 12, 1890.

Supreme Court of the United States.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

The Steamship "BREAKWATER," her engines, &c., THE OLD DOMINION STEAMSHIP COMPANY, Claimant, Appellant,

against

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY. Libellant, Appellee.

No. 1534.

October Term 1890.

To EDWARD L. OWEN, Esq.,
Counsel for appellant.

Dear Sir.—Please to take notice that on the record herein, filed November 12, 1890, and on the following statement of facts and objects of motion, I shall move the Court, in the Court Room hereof, in the Capitol, Washington, District of Columbia, on the second day of March, 1891, at the opening of Court, or as soon thereafter as counsel can be heard, under Rule Six, and under the inherent power of the Court to administer justice, to dismiss the appeal herein or to affirm the decree appealed from.

New York, February 4th, 1891.

FRANKLIN A. WILCOX.
Counsel for Appellee.

Statement of Facts and Objects of Motion.

FACTS.

This was an action *in rem* brought by the appellee, as owner of the steam ferry boat "Pavonia," her engines, &c., in the District Court of the United States for the Eastern District of New York, to recover damages arising from a collision between the said ferryboat and "Breakwater" on the 16th day of December, 1887 (pp. 1–6).

Upon the issues raised by the pleadings the action was tried before Benedict, J., and on the 23d day of May, 1889, decided and an opinion filed as follows (39 F. R.., 511)

"It is proved that the "Breakwater," although she stopped "her engine, did not then reverse it, it is also proved that if "the engine of the Breakwater had been reversed as soon as "possible after it was stopped there would have been no collis- "ion. The Breakwater, having the ferry-boat on her star- "board side, and upon a crossing course, was bound to do all "in her power to avoid striking the ferry-boat as she crossed. "It was in her power to reverse the engine sooner than she did, "and by so doing to have avoided striking the ferry-boat as she "did. The circumstances of wind and tide and the signals ex- "changed were sufficient to show to those in charge of the "Breakwater that reversing the engines of the Breakwater "could not be delayed without risk of collision. The delay "that occurred in reversing the engines of the Breakwater was "therefore a fault, and renders the Breakwater responsible for "the collision that occurred. The ferry-boat was guilty of no "fault."

Thereafter an appeal was taken by the claimant of the "Breakwater" to the Circuit Courtand a new trial thereon was had before Blatchford, Justice, upon the testimony taken in the District Court and two depositions taken in the Circuit Court, and on or about the 5th day of July, 1890, the said Circuit Justice filed certain findings of facts and conclusions of law as follows:

"1. The steam ferry-boat Pavonia, owned by the New "York, Lake Erie and Western Railroad Company and the "steamship Breakwater, owned by the Old Dominion Steamship "Company, collided with each other at or about 4:50 o'clock, "P. M., on the 16th day of December, 1887, in the North River,

" about abreast of the middle of the slip between pier 28, (old " number), known as the Fall River pier, and pier 29 (old num- " ber), known as the Providence pier, and about 400 feet out in " the river from the ends of those piers."

" 2. Immediately adjacent to pier 29 (old number) and to " the northward thereof there were two slips of the Pavonia " or Erie Ferry, which was operated by the New York, Lake " Erie and Western Railroad Company. The more northerly " of those slips was bounded on the north by a pier known as " No. 20 (new number) which was the first pier to the north of " pier 29 (old number), and extended out into the river about " 150 feet further than pier 29 (old number) and the piers below " it. Those slips were at the foot of Chambers street."

" 3. Shortly before the collision the Pavonia left her upper " or northerly slip, on the New York city side, on one of her " regular trips, bound to her slip across the river in New Jer- " sey, which latter slip was to the northward of Chambers " street."

" 4. The distance from the upper or northerly rack of the " slips at Chambers street to the upper or northerly side of the " pier at Barclay street, which was the fourth street south of " Chambers street, was 881¼ feet. The upper slip at Chambers " street was 87½ feet wide, the whole slip was 200 feet wide.

" 5. At the time the Pavonia left her bridge the Break- " water was about off Barclay street, coming in from sea on " one of her regular trips to her berth at the foot of Beach " street, which was to the north of Chambers street."

" 6. The tide was strong ebb, the wind was northwest, and " the weather was clear."

" 7. The Pavonia started to move slowly out of her slip " under a hard-a-port wheel, which was fastened in the becket, " and so remained until the collision. As her bow emerged " the effect of the wind and tide was to swing her bow some- " what down the river, but this swing was overcome before " the collision, at which time her bow was on a swing up the " river. The wind and tide had the effect also to set her bodily " down the river. Her course, from the time of her starting " until the collision, was the usual course of ferryboats on " leaving their slips under like circumstances. The course of " the Breakwater from the vicinity of the Battery was " along the New York docks. As she neared the Cortlandt " street ferry-slip she approached closer to the docks, and

"from that time continued on a course about 400 feet there-
"from."

"8. The Pavonia sounded the usual long, single whistle "to warn approaching vessels as she commenced to move. "Shortly thereafter the Breakwater sounded in reply a single "whistle, at which time the Pavonia was moving slowly, her "bow having reached about the outer end of Pier 20 (new "number). The Pavonia immediately replied by a single "whistle which was answered by a single whistle from the "Breakwater. The Pavonia, when her stern was about as far "out as the outer end of pier 20 (new number), sounded "another single whistle to the Breakwater, which was an-"swered by the Braekwater by a single whistle. Before the "collision the Pavonia sounded alarm whistles."

"8. As soon as the Pavonia received the first whistle from "the Breakwater her engine was put to full speed ahead, "and so continued until the collision. As soon as the Break-"water sounded her first whistle her engine was immediately "stopped, and when the Pavonia sounded her second whistle "the engine of the Breakwater was immediately put full speed "astern."

"9. The speed of the Breakwater at the time she sounded "her first whistle was about six miles an hour, but at the time "of the collision her headway by the land was almost entirely, "if not quite, stopped."

"10. The stem of the Breakwater struck the Pavonia on "the port side of the latter a little abaft her wheel, cut "through her guard into her hull, and the Pavonia was thereby "seriously damaged."

"11. If the engine of the Breakwater had been promptly "reversed when she blew her first whistle her headway could "have been entirely stopped in going her length of 212 feet "and the collision would have been avoided."

"12. The New York, Lake Erie and Western Railroad "Company suffered damages by reason of the collision as "follows, viz.: Repairs to the Pavonia, $4,770.02, with interest "from February 1st, 1888; demurrage, $2,800, with interest "from June 18th, 1889."

"On the foregoing facts I find the following conclusions of "law:

"1. The Breakwater was in fault because, having the Pa-

"vonia on her own starboard side and being on a crossing "course, she did not keep out of the way of the Pavonia, and "in not taking into consideration the probable and usual "course of the Pavonia under the circumstances of the tide "and the wind, and in not reversing her engine at the time she "gave her first whistle."

"2. The Pavonia was without fault.

"3. In the suit brought by the New York, Lake Erie and "Western Railroad Company, it is entitled to a decree for "$4,770.02, with interest from February 1st, 1888, and for "$2,800, with interest from June 18th, 1889, and for its costs in "the District Court, taxed at $159.75, and for its costs in this "Court, to be taxed.

"4. In the suit brought by the Old Dominion Steamship "Company a decree must be entered dismissing the libel and "awarding to the New York, Lake Erie and Western Railroad "Company its costs in the District Court, taxed at $41,95, and "its costs in this Court, to be taxed."

Thereupon the appellant filed certain exceptions to the said findings and conclusions, also presented to the Court certain additional requests to find which were refused by the Court and exceptions taken (pp. 37–41).

Thereafter a final decree was entered against the appellant and in favor of the appellee for the sum of $8,768.85 (p. 42).

Thereafter a petition of appeal to this Court was filed October 8, 1890, and allowed by Hon. E. Henry Lacombe, Circuit Judge (p. 44). The record was then duly transmitted to this Court.

The Exceptions are of two classes:

1st. Exceptions to certain findings of fact and conclusions of law, "On the ground and for the reason that the evidence "does not support the same."

2d. Exceptions to the refusal of the Court to make certain findings of fact and conclusions of law.

It will be found that the findings made are fully supported by the evidence and that there is no evidence to warrant any other findings which would be material to the issue (the references are to the pages of original record printed in margin of printed record).

First Class.

1st EXCEPTION.—The finding is supporten by the testimony of Lawrence P. Decker (16): "At the time of the collision the "stem of the Breakwater was in about the centre between piers "28 and 29." William Conklin (19): "The collision was mid-"way between the Fall River and Providence piers (28 and "29)." Charles H. Gardiner (20); David Pearsall (21); James James Carran (22); Harvey H. Mosher (23); James Pawson, (25, 26); John H. Kinner (29); Albert Cobb Gibbs, second mate of the Breakwater (29): "When the collision took "place the bow of the Breakwater was about half-way between "28 and 29;" Ezra Deball (32).

2D EXCEPTION.—The finding is supported by the testimony of Lawrence P. Decker (16): "I got one whistle from the "Breakwater when the Jersey end of the ferry-boat Pavonia "was about the end of pier 20. * * * At the time of re-"ceiving that one whistle from the Breakwater I was running "under a slow bell." Joseph Drummond, engineer (18): "On "leaving the bridge I got a jingle bell, and after that a slow "bell. Those are the usual bells on leaving. * * * I "answered my bells promptly." Conklin (18); Charles H. Gardiner (21): "I saw the Pavonia as soon as she commenced "to leave her slip. I suppose it was just as soon as she started "that she commenced to blow her whistle, for I could see her "edging out gradually when she blew her whistle."

James Pawson (25): "My attention was called to the "Pavonia by hearing one blast of the whistle. * * "* The Pavonia was coming out of her slip, and had "not got half her length away from the bridge, probably.' (26): "When I heard the first whistle from the Pavonia she "was moving slowly out of her slip."

Lawrence P. Decker (15): "On starting from the bridge I "put the wheel hard-a-port in the becket. This continued un-"til the time of the collision, so that when we came out of the "slip our starboard bow was against the upper rack." Conklin (18).

Lawrence P. Decker (17): "Our course was about the same "as usual. As a matter of experience, we find that an ebb tide "will set us down stream some; an extraordinary tide and "northwest wind will cut us down pretty near to Barclay "street, but on this occasion it was about the customary set

" down. Conklin (19): "Our course was the usual one under " the circumstances and with an ebb tide." Chas. H. Gardiner (21); Ira A. Dole, master of the Breakwater (37).

3D EXCEPTION.—The finding is supported by the testimony of Lawrence P. Decker (15): "As I commenced to move from " the bridge I gave a long blast of the whistle called the alarm " whistle. That was the usual whistle on leaving the bridge. " It was longer than a signal whistle." William Conklin (18); Chas. H. Gardiner (20): "The Pavonia blew a long blast first, " coming out of the slip. * * * When the Pavonia gave a " long blast the Breakwater was on the lower side of Barclay " street ferry. This long blast was such as is usually used by " all steamers as well as all ferry-boats on coming out of a slip. " I so understood it at the time. It was a signal to everybody " to whom it might concern." James Carran (22); James Pawson (26, 27); John E. Tunnel (32).

Lawrence P. Decker (16): "I got one whistle from the " Breakwater when the Jersey end of the ferry-boat Pavonia " was about the end of pier 20." Conklin (18): "One long " blast of the whistle was given on leaving. * * * The " Breakwater blew one whistle next. The Jersey end of the " Pavonia had got out to the end of pier 20 when that whistle " came." Chas. H. Gardiner (20): "I should judge the Pavo- " nia's stern was about 100 feet from her bridge when I heard " the one whistle from the Breakwater. The Pavonia answered " that, and gave him another one after that, when her bow was " about 100 feet outside the upper rack, and the latter one was " answered by the Breakwater." Carran (22); Albert Cobb Gibbs (30); Dole (36).

Lawrence P. Decker (16): "At the time of receiving that " one whistle from the Breakwater I was running under a slow " bell. On answering the Breakwater's one whistle I gave a " jingle bell to the engineer to hook her up under full speed. " * * * From that time up to the collision I was running " under full speed." Drummond (18); Conklin (19): "Right " away after the Breakwater blew, the Pavonia's jingle bell was " was given for full speed. No other bells were given from that " time until she struck."

4TH EXCEPTION.—The finding is supported by the testimony of Decker (17): "When I first saw the Breakwater I judge she " was running five or six knots. I was not able to observe any

"diminution of that speed up to the time of the blow." Gardiner (21): "I noticed the Breakwater's propeller moving "ahead until just about the moment of collision, and the ferry-"boat was then 25 feet away from the Breakwater."

Pearsall (21): "The Breakwater was going ahead at the "rate of about six miles per hour. Q. Was there any dimi-"nution of that speed from the time you first noticed the Break-"water until the moment of the blow? A. No, sir; I couldn't "say as there was."

Harvey H. Mosher, master of the tug "Wyoma," (23): "The Breakwater was going up the river the same as I was. "* * * Outside of me about fifty feet. * * * We were "running under regular speed, hooked up, and a jingle bell, "going by the docks about six miles per hour. I didn't notice "any gain on the Breakwater. We seemed to be holding her "all along the docks. She was going about the same speed "until the time of the collision."

Albert Cobb Gibbs, second mate of the Breakwater (30): "The Pavonia * * * blew one whistle, and the Breakwater "answered with one whistle. * * * I don't know exactly "how fast the Breakwater was going; I should think about six "or seven miles per hour."

5th EXCEPTION.—The finding is supported by the testimony of Ira E. Dole, master of the Breakwater, (35): "The length of "the Breakwater is 212 feet. (37): "I think that if I had re-"versed full speed astern she would have forced her length."

"I didn't suppose the tide would set the Pavonia down over "one length—that is, two hundred feet—from the upper bridge, "the upper rack. I made the calculation it would set her "down, for I stopped the ship."

"Q. If you had known the tide would set her down more "wouldn't you have reversed before you did?"

"A. Yes, sir; if I had supposed she was coming right down "the river for me I should have reversed at once." * * * "The most that the Pavonia got headed down was from W. S. "W. to S. W. by W. two or three points. Then her bow com-"menced to swing to starboard, and at the time of the colli-"sion was swinging slowly up."

James Pawson, (27): "I don't think there would have "been any collision if the Breakwater man had known the ferry-"boat was coming down as low as she did."

6th EXCEPTION.—The conclusions of law are supported by the findings (see above).

Second Class.

The requests under this class are a substantial repetition of the appellant's proposed findings and conclusions of law (pp. 32-34).

1st REQUEST.—The subject of this request is embraced in the first finding of the Court. The appellant excepted only to such part of the finding as determined the place of the collison (see first exception). The finding is supported by the evidence (see above), Decker (16); Conklin (19); Chas. H. Gardiner (20); David Pearsall (21); James Carran (22); Harvey H. Mosher (23); James Pawson (25, 26); John H. Kinner (29, 30); Albert Cobb Gibbs, (30); Ezra Deball (32).

2d REQUEST.—The fact was found as requested excepting "a competent lookout was stationed forward." There was no evidence to support the requested finding of a competent lookout. Moreover, it was immaterial.

3d REQUEST.—There is no evidence to support such requested finding. The evidence is to the contrary (Conklin 19). The Court did find that the ferry-boat was on one of her regular trips bound to her slip across the river in New Jersey, which latter slip was to the northward of Chambers street (see third finding, (63). The finding therefore was in substantial compliance to the request.

4th REQUEST.—There is no evidence to support such requested finding that the "effect of the wind and tide would be, unless "guarded against, to set the Pavonia down the river below her "slip to an unusual extent." The evidence is to the contrary (Decker, 17): "Our course was about the same as usual. As a "matter of experience, we find that an ebb tide will set us down "stream some, an extraordinary tide and northwest wind will "cut us down pretty near to Barclay street, but on this occasion "it was about the customary set-down." Conklin, (19); Gardiner (21); Dole (37).

It was immaterial that "The Pavonia had made several trips "previous to this, and her pilot knew the effect of the tide and "wind." The Court found, in the first clause, that the course was the usual course.

5th REQUEST.—The evidence fails to establish the facts as re-

quested: The Court having found the distance between Chambers street ferry-rack and Barclay street to be 881¼ feet (see fourth finding); and also that at the time the Pavonia left her bridge, the Breakwater was about off Barclay street (see fifth finding), which findings were not excepted to; and also that the Breakwater could have been entirely stopped in going her length of 212 feet, and the collision have been avoided if she had been promptly reversed (see eleventh finding); and also that while the Pavonia was moving slowly out of her slip, the Breakwater sounded in reply to the Pavonia's long whistle, a single whistle, the Pavonia just having reached about Pier 20 (see eighth finding); and also that the tide was strong ebb (see sixth finding). The Court was correct in its findings, and logically required to refuse this request.

6TH REQUEST. The Court found substantially as requested, except with respect to the speed of the Breakwater, which was found to be, at the time she sounded her first whistle, about six miles an hour (see ninth finding). This is fully supported by the evidence of Mosher, master of the tug "Wyomia," also bound up the river near the Breakwater, who testified (23): "We running under regular speed, hooked up, and a jingle "bell, going by the docks about six miles an hour. I didn't "notice any gain on the Breakwater. We seemed to be hold-"ing her all along the docks. She was going about the same "speed until the time of the collision. If the Breakwater had "slowed I would have noticed it, because I would have gone by "her, as I kept up my speed." See also Decker (16), Pearsall (21), Gardiner (21).

7TH REQUEST. The movements of other vessels were immaterial.

8TH REQUEST. The distances found by the Court (see fourth finding) was the adoption of the eighth proposed finding of the appellant, and were sufficient for the correct decision of the case particularly in view of the finding that the collision was about abreast "of the middle of the slip between Piers 28 and "29" (see first finding).

9TH REQUEST. The Court found substantially all the material facts embraced in the request (see fifth and eighth findings, 63, 64), to wit:

(*a*). "At the time the Pavonia left her bridge the Breakwater was about off Barclay street, coming in from sea on one of her regular trips to her berth at the foot of Beach street, which was to the north of Chambers street."

(*b*). "The Pavonia sounded the usual long single whistle to warn approaching vessels as she commenced to move."

(*c*). "Shortly thereafter the Breakwater sounded in reply a single whistle, at which time the Pavonia was moving slowly her bow having reached about the outer end of Pier 20."

The substance of this request is contained in the appellant's third exception to these findings already considered.

10TH REQUEST. The seventh and eighth findings of the Court (64) cover the material facts in this connection.

11TH REQUEST. The eighth finding of the Court (64) covers the material facts in this connection.

12TH REQUEST. The seventh and eighth findings of the Court (64) cover the material facts in this connection.

13TH REQUEST. The eighth finding of the Court (64) covers the material facts in this connection; and see testimony of Decker (16), Conklin (18), Drummond (18).

14TH REQUEST. The eighth finding of the Court (64) covers the material facts in this connection.

15TH REQUEST. The evidence does not support such finding.

16TH REQUEST. The evidence does not support such finding. The Court found the fact to be the contrary, which finding the evidence fully supports. Decker (15), and other witnesses *supra*.

17TH REQUEST. This request is inconsistent with the fifth request, and is contrary to the findings upon the evidence.

18TH REQUEST. The request is frivolous. It assumes that the ferryboat was not permitted to leave her slip because there might be danger in doing so if other vessels did not fulfill their obligations to her under the rules of navigation.

19TH REQUEST. The request is inconsistenth with fifth request, and contrary to the findings of the Court upon the evidence.

20TH REQUEST. There is no evidence to support the finding.

21ST REQUEST. There is no evidence to support the finding.

Objects of Motion.

The objects of this motion are to have the appeal dismissed for want of jurisdiction of this Court, or to have the decree of the Circuit Court affirmed, because it appears that the appeal was taken for delay, because the exceptions of the appellant are frivolous, and because the law of the case is so well settled as not to need further argument.

Dated New York, February 4th, 1891.

FRANKLIN A. WILCOX,
Counsel for Appellees.

[illegible]

[illegible] Court of the United States.

No. 1554.

OCTOBER TERM, 1890.

THE STEAMSHIP "BREAKWATER," HER ENGINES, &c., THE [illegible] DOMINION STEAMSHIP COMPANY,

Claimants-Appellants,

vs.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY,

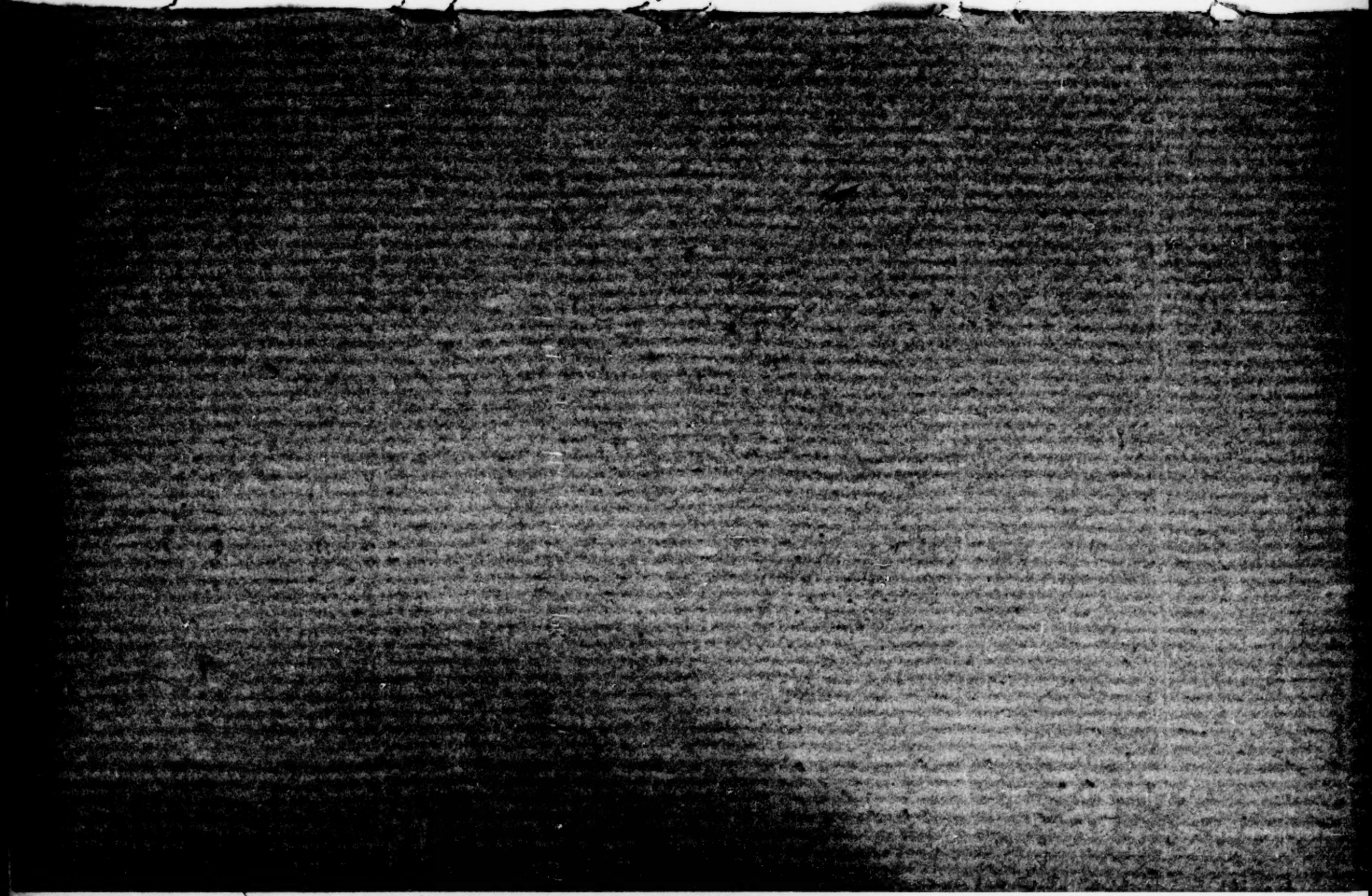
Libellant-Appellee.

BRIEF

On part of Appellee on Motion to dismiss appeal, or affirm decree.

FRANKLIN A. WILCOX,

Counsel for Appellee.



Supreme Court of the United States,

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

The Steamship "BREAKWATER," her Engines, &c., THE OLD DOMINION STEAMSHIP COMPANY,

Claimant, Appellant,

vs.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,

Libellant, Appellee.

No. 1,554.

October Term, 1890.

Brief on part of Appellee on motion to dimiss appeal or affirm decree.

STATEMENT.

This action arose out of a collision, happening in the North River, New York, on the 16th day of December, 1887, between the steamship "Breakwater," belonging to the appellant, and the ferryboat "Pavonia," belonging to the appellee. The "Breakwater" was found solely in fault. The facts will be found in the record, and notice of motion submitted herewith.

POINTS.

I.

The appeal should be dismissed.

An examination of the record will show that this appeal should not be entertained under the provisions of the Act of

February 16, 1875, providing that the Supreme Court upon appeal shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions prepared as in action at law (18 St., 315).

There were no rulings upon the admission or exclusion of evidence excepted to at the time, and there is no real question of law in the case.

The facts were all found adversely to the appellant, and such findings should have terminated the action under the act, but the appellant has sought to overcome its effect by certain exceptions which ask the Court to review the evidence, and hold the Circuit Court to have been wrong in such findings.

That there cannot be such review is well established by many decisions construing the act.

The Abbottsford, 98 U. S., 440-444.
The Benefactor, 102 Id., 214-218.
The Annie Lindsley, 104 Id., 185-191, *et passim.*

Jurisdiction cannot be given to the Court by exceptions, "on the ground and for the reason that the evidence does not "support" the findings, when, as a matter, the evidence does support them. The errors assigned relate only to the sufficiency of the evidence to support the findings. These will not be considered by the Court.

Zeckendorf *vs.* Johnson, 125 U. S., 617.

Nor can jurisdiction be given by exceptions to the refusal of the Court below to make certain findings either immaterial or incidental to the general findings establishing liability, amounting only to evidence.

The Francis Wright, 105 U. S., 381.
Merchants Ins. Co. *vs.* Allen, 121 Id., 67.
Hathaway *vs.* Bank, 134 Id., 494.

II.

course she did not keep out of the way of the "Pavonia," and in not taking into consideration the probable and usual course of the "Pavonia," under the circumstances of the tide and the wind, and in not reversing her engine at the time she gave her first whistle.

2. The Pavonia was without fault.

These conclusions are in accord with well settled principles of law which require no further argument.

Navigation Rules, 19, 21; Sec. 4233 U. S. Rev. Stats.
The Relief, Olcott, 104.
The John Taylor, 6 Ben., 227.
The Favorita, 8 Blatch., 542; 18 Wall., 598.
The Alaska and Pequot, 30 Fed. Rep., 839.

It is evident the exceptions are frivolous, and the appeal taken for delay only. Under such circumstances cases will not be retained for argument, and an affirmance is proper.

Hinckley *vs.* Morton, 103 U. S., 764.
Micas *vs.* Williams, 104 *Id.*, 556.
Swope *vs.* Leffingwell, 103 *Id.*, 3.
The S. C. Tryon, *Id.*, 267.
Zreckendorff *vs.* Johnson, *Supra.*
Chanute City *vs.* Trader, 132 U. S., 210.

In the latter case it is said: BLATCHFORD, J.:

"In *Micas* vs. *Williams*, 104 U. S., 556, there was a motion "to affirm united with a motion to dismiss a writ of error. The "affidavits in opposition to the latter motion showed jurisdic- "tion * * * But the Court affirmed the judgment on the "ground that the writ was taken for delay only.

"In *The S. C. Tryon*, 105 U. S., 267, there was a motion to "affirm a decree united with a motion to dismiss the appeal in "an Admiralty suit. The ground for making the motion to "dismiss, was that there was no bill of exceptions, but only a "finding of facts and conclusions of law. The Court overruled "that ground, but it is difficult from the report of the case to "see what color of right there was to a dismissal. Yet it "affirmed the decree on a consideration of the findings of "fact.

"In *Swope* vs. *Leffingwell*, 105 U. S., 3, there was a motion

" to affirm united with a motion to dismiss a writ of error to a " State Court. The motion to dismiss was made on the ground " that there was no Federal question involved. The Court held " that it had jurisdiction, but affirmed the judgment on the " ground that the case on the merits was governed by previous " decisions.

" In the present case there does not appear to be any ground " for contending that this Court has no jurisdiction; yet we are " entirely satisfied that the reasons assigned for taking the writ " of error are frivolous, and that it was taken for delay only. * * * * * *

" But without putting a different interpretation on sub- " division 5 of rule 6 from that which has hitherto prevailed, " we are of the opinion that the judgment in the present case " must be affirmed. * * * * * * This Court, in the ex- " ercise of its inherent power and duty to administer justice " ought, independently of subdivision 5 of rule 6, to reach " the mischief by affirming the action below. This is a proper " case for doing so."

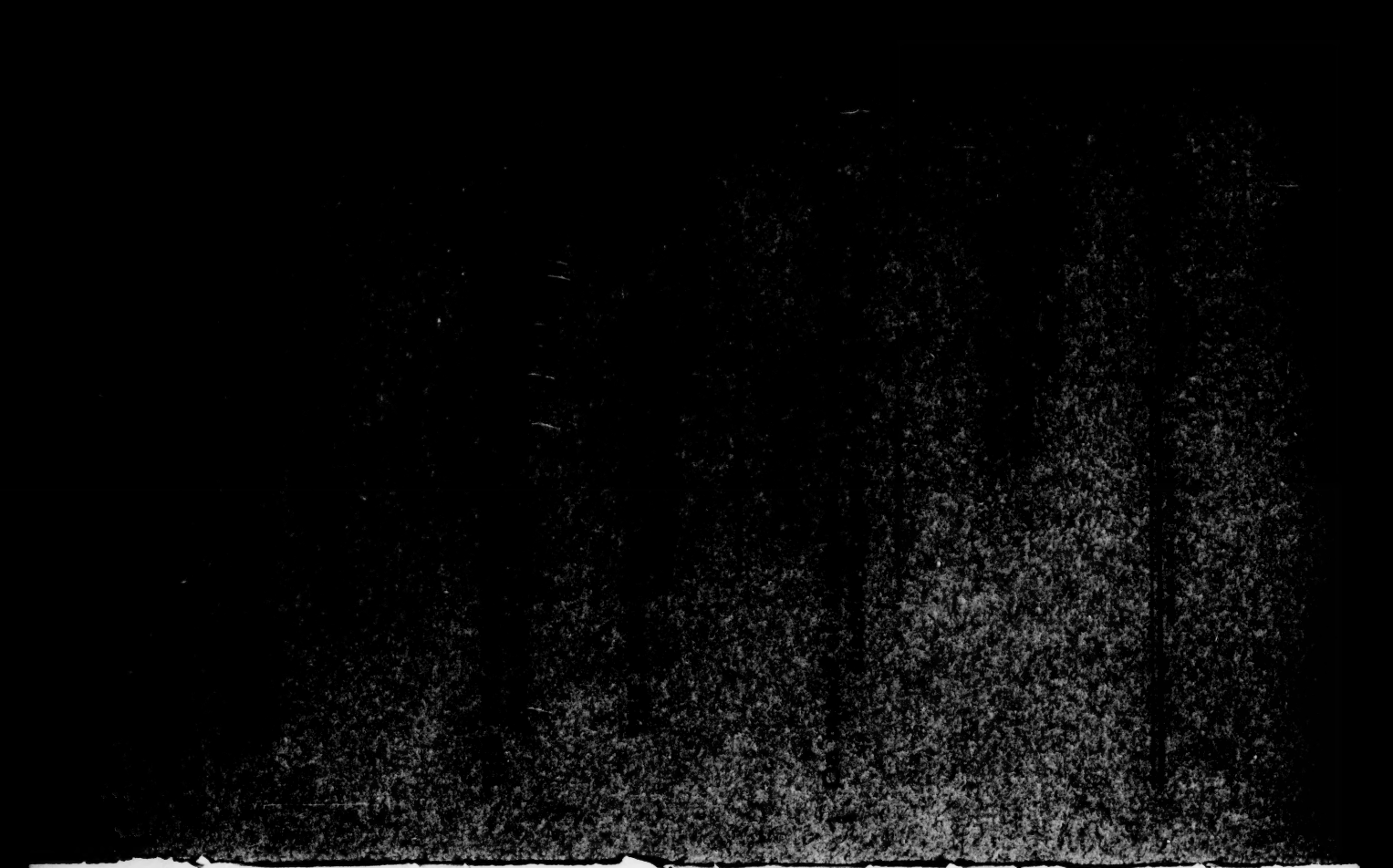
It is submitted that this is also a proper case for such action.

III.

The appeal should be dismissed or the decree affirmed with interest, costs and 10% damages. (Rule 23 as amended March 10th, 1890).

Respectfully submitted,

FRANKLIN A. WILCOX,
Counsel for Appellee.



SUPREME COURT OF THE UNITED STATES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

The Steamship *Breakwater*, her engines, &c., The Old Dominion Steamship Company, *Claimant—Appellant,* *vs.* THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, *Libellant—Appellee.*	*No. 1554* *October Term, 1890.*

Brief on behalf of Appellant in opposition to Motion to dismiss Appeal or affirm Decree.

STATEMENT.

This is an appeal in admiralty by the claimant of the steamship *Breakwater*, from the decree of the United States Circuit Court for the Eastern District of New

York, awarding the libellant $8,768.85, damages sustained by the ferry-boat *Pavonia* through a collision with the *Breakwater* on December 16, 1887. (Record, fols. 78, 79.)

Points.

First Point.—THE MOTION TO DISMISS THE APPEAL SHOULD BE OVERRULED.

I.—*There is no question as to the jurisdiction of the Court to entertain the appeal.*

A. The amount of the recovery from which the appeal is taken is sufficient to confer jurisdiction.

B. The suggestion contained in the brief of counsel for the appellee (Point I) has no force.

The Act of 1875 does not in any manner affect the jurisdiction of this Court to hear appeals in admiralty. It only limits the review to a consideration of the questions of law raised by the record. The extent of such review is wholly distinct from the power of the Court to entertain the appeal; the jurisdiction of this Court, therefore, is independent of the exceptions which may be presented upon the record.

The *S. C. Tryon*, 105 U. S., 267.

In this case Chief Justice Waite says:

> "A bill of exceptions is not necessary to give this Court jurisdiction of an appeal in admiralty under the provisions of the Act of February 16, 1875, Ch. 77. The findings which the statute requires must be stated by the Court. These, therefore, become part of the record without any action of the parties, and errors of law arising on them need not be presented by exceptions. They are in the nature of a special verdict as to which the inquiry is always open in the reviewing Court whether, when taken in connection with everything else that appears, it is sufficient to support the judgment."

Second Point.—THERE BEING NO COLOR OF RIGHT TO A DISMISSAL, THE MOTION TO AFFIRM THE DECREE SHOULD BE DENIED.

Whitney v. *Cook*, 99 U. S., 607.
Hinckley v. *Morton*, 103 *id.*, 764.
School District of Ackley v. *Hall*, 106 *id.*, 428.
Davies v. *Corbin*, 113 *id.*, 687.
Walston v. *Nevin*, 128 *id.*, 578.
New Orleans v. *Construction Co.*, 129 *id.*, 45.
Micas v. *Williams*, 104 *id.*, 556.
Chanute City v. *Trader*, 132 *id.*, 211.

Third Point.—SHOULD THE COURT CONSIDER THE MOTION TO AFFIRM THE DECREE UPON THE MERITS, IT IS SUBMITTED THAT THE QUESTIONS INVOLVED IN THE APPEAL NECESSITATE A DENIAL OF THE MOTION.

I.—*The motion should not be granted unless it is apparent on the record that the appeal is without merit, and taken for the pnrpose of delay.*

The object of rule 6, sub. 5, is to prevent the working of mischief through the prosecution of appeals when no real grounds exist therefor, and it has been held that the same power should be exercised by the Court independently of the rule.

Chanute City v. *Trader*, *supra*.

Such power, however, should not be exercised, except in cases where an inspection of the record leaves no doubt but that the grounds of the appeal are frivolous; otherwise a greater mischief will be wrought by depriv-

ing suitors of the benefit which their right of appeal gives to be heard at length by this Court.

II.—*The appeal is in no manner frivolous, but presents serious questions involving the construction of the rules of navigation, which, so far as we have been able to find, have never received a direct adjudication by this Court.*

This action arose out of a collision between two steam vessels, and the law governing their navigation, upon which this Court is now asked to determine where the responsibility should rest, is contained in the following Revised International Rules and Regulations for preventing collisions at sea, adopted by Act of Congress March 3, 1885:

ART. 16. *If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.*

ART. 18. *Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary.*

ART. 22. *Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course.*

ART. 23. *In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.*

These rules should be read in connection with each other, and the object for which they were framed should be constantly kept in view, namely, the prevention of risk of collision.

A. The decisions of the Courts below were based upon Articles 16 and 22, regardless of Article 18. This was error, for the situation directly involved the application of Article 18.

We submit that Articles 16 and 22 relate to the direction in which vessels are proceeding; while Article 18 relates to their proximity and speed. That the expression "keep her course" in Article 22 does not mean maintain both heading and headway, but refers only to the use of the helm.

The Articles are not inconsistent, and Article 18 applies as directly to steamers crossing as to those in any other positions, which would not be the case if, under Article 22, a crossing steamer was obliged to maintain her speed.

Article 18, embracing all situations, is more comprehensive than the rules which relate to a single situation, for which reason its observance is obligatory at all times.

In the *Albemarle*, 8 Blatch., 200, two steamers were meeting end on, requiring each to port her helm (Revised Stats., §4233, Rule 18); yet both were held in fault for not slowing, or stopping and reversing.

Woodruff, J., says (p. 205):

> "But, in truth, the grand fault of both vessels was that they did not act sooner, instead of waiting until instant danger of collision was impending. The rule of the statute is as imperative as any other, that when approaching, so as to involve risk of collision, each should slacken speed, and, if necessary, stop and reverse. This should not be delayed till efforts to slow, stop and reverse will be useless."

In the *Beryl* (9 P. D., 137) Brett, L. J., construing Articles 16, 18 and 22, says:

> "It was suggested to us to-day that 'keep her course' meant keeping her course at the same pace at which she was going before she was called upon to obey this rule. But keeping her course means that she is to keep on the same direction as before; it has nothing to do with the question of speed."

In the same case Bowen, L. J., says (p. 144):

> "It has been suggested that the expression, keep her course, used in Article 22, refers to the speed of the vessel as well as to the direction of her head; but this is an untenable argument."

Our contention is further illustrated by the decisions with regard to the duty of a steamer in a fog, that she shall not change her course (*i. e.*, shall keep her course) in ignorance of the position and course of an approaching vessel, and yet shall lessen her speed.

The *Alberta*, 23 Fed. Rep., 807, 811, and cases cited.
The *Hammonia*, 4 Ben., 515, 522.
The *Louisiana*, 2 *id.*, 371, 378.
The *Dordogne*, 10 Prob. Div., 6, 9.
The *Frankland*, L. R., 4 P. C., 529.

In the absence of any rule as to speed it might be implied that under Article 22 the privileged vessel should maintain her pace; but Article 18 expressly negatives such privilege, and imposes an additional duty upon such vessel.

B. What is risk of collision within the meaning of Article 18?

> "Risk of collision begins the very moment when the two vessels have approached so near each other, and upon such courses, that by a departure from the rules of navigation, whether from want of good seamanship, accident, mistake, misapprehension of signals, or otherwise, a collision may be brought about."
>
> Longyear, J., in the *Milwaukee*, Brown's Ad., 313, 331.

In the *Ericsson* Swab. Ad., 38, Doctor Lushington says:

> "The intention of the Statute is, that when two vessels are approaching each other, and are within such a distance that there is a strong probability of a collision if both keep their courses, in that case" * * * the ships are to take the steps required by law.

In the *Galileo*, 28 Fed. Rep., 469, Wallace, J., says:

> "The language of the twenty-first rule (Art. 18) is imperative and plain. It applies from the moment when the approach of vessels is such as to involve risk of collision between them. * * * The rule does not permit the calculation of chances and the weighing of probabilities, because risk intervenes the moment this becomes necessary; and it certainly cannot be material whether the risk depends upon the contumacy of the other vessel, or her supineness in fulfilling her obligations, or the probability that she will perform her duty, or upon circumstances quite independent of such chances."

In the *Aurania*, 29 Fed. Rep., 123, risk of collision is stated to be:

> "Not merely certainty of collision if no efforts be made to avert it, but danger of collision; and there is danger of collision whenever it is not clearly safe to go on."

Citing the *John McIntyre*, 9 Prob. Div., 135.

In Marsden on Collision, second edition, page 303. it is said: "What constitutes risk of collision it is difficult to define."

It may be difficult, but it is not impossible to announce a principle which will be a safe and sufficient rule of action.

In the *Sylph*, 2 Sp. E. & A., 75, 82, Doctor Lushington says:

> "We have never got to this, and hope we never shall, that it (the rule) applies where two vessels are sailing properly, and there is no chance of a collision."

In the *Free State*, Brown's Ad. 251 (affirmed 1 Otto, 200), it is held that it is not the duty of a steamer to slacken her speed, or stop and reverse, when the apparent circumstances do not indicate any danger; thus indirectly deciding that in such a case there is no risk of collision within the meaning of the rule. The same doctrine is held in

The *Rhonda*, 8 Appeals Cases, 549.
The *Jesmond*, L. R., 4 P. C., 1.
The *Nereus*, 23 Fed. Rep., 448, 456.

We submit that the proper construction of Article 18, illustrated by the authorities cited, is, that risk of collision which requires slowing, or stopping and reversing, is determined by the situation as it exists when necessity for such action begins, and does not depend upon what either vessel may properly expect the other to do.

In other words, when two steam vessels are so close together, and upon such courses, that collision will probably occur unless one, or the other, or both, slow, or stop and reverse, *then there is risk of collision which requires such action by both*, and the risk continues until one, or the other, or both, have terminated it by slowing, or stopping and reversing.

The *Nichols*, 7 Wall., 656, 663.
The *Johnson*, 9 *id.*, 146, 153.
The *Wenona*, 19 *id.*, 41.

C. The converse of Article 18 is necessarily true, namely, that unless risk of collision is involved there is no obligation to slow, or stop and reverse.

In the *Scotia*, 14 Wall., 170, it is said:

> "She (the steamer) is required to take no precautions when there is no apparent danger."

See cases, *supra*.

D. When risk of collision is involved it is the duty of each vessel to slow, or stop and reverse; and this duty is independent of the observance or neglect by the other of any duty imposed upon her.

The article itself makes no exception, but expressly prescribes that *every* steamship shall be governed by its provisions.

In the *Beryl*, *supra*, it is said:

> "Then we come to another rule (Art. 18), which does not in any way modify, clash with, or require to be construed at the same time as the other rules. It is an wholly independent rule. *This rule, in the case of two steamers approaching each other, applies to both of them.* The former rules apply to one of the two vessels; this one applies to both if they are steamers. * * * At that moment, if what they are doing involves risk of collision, *they are both to slacken their speed. It applies to both of them.*"

In *Williamson* v. *Barrett*, 13 How., 106, 109, Nelson, J., says:

> "Upon the water as upon the land, the law recognizes no inflexible rule, the neglect of which by one party will dispense with the exercise of ordinary care and caution in the other. A man is not at liberty to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not use common and ordinary caution to avoid it. One person being in fault will not dispense with another's using ordinary care for himself."

See, also, the *A. Denike*, 3 Cliff., 117, 122.

In the *Huntsville*, 8 Blatch., 228-231, Woodruff, J., says:

> "The sixteenth of the rules of navigation, enacted by Congress, is imperative that a steamship, when aproaching another ship, so as to involve risk of collision, shall slacken her speed, and, if necessary, stop and reverse. This does not mean that she may wait until the danger is imminent before she slackens her speed, nor does it mean that she need not slacken her speed, if the risk of collision is caused by some fault in the approaching vessel. Life and property on the seas are cared for, and are intended to be protected by the law; and when risk of collision appears, it is the absolute duty of the steamer to slacken her speed, and not to trust exclusively to speculation or hope of avoiding it by other means."

The *Galileo*, *supra*.
The *Nereus*, *supra*.

In the *Manitoba*, 122 U. S., 98, Blatchford, J., says:

> "If there was risk of collision in the approach of the C towards the M, prior to the sudden sheer of the C, it was a risk affecting the

M equally with the C, and imposing upon her the *same* duties of slackening her speed, or, if necessary, stopping and reversing, under Rule 21 of Sec. 4233 of the Revised Statutes, which it imposed on the C.',

The *Memnon*, 59 Law Times (N. S.), 289; 6 Aspinall, N. S., 317.
The *Sunnyside*, 91 U. S., 208.
The *Maria Martin*, 12 Wall., 31.
The *Continental*, 14 *id.*, 345, 359.
The *City of Hartford*, 11 Blatch., 72.
Affirmed 97 U. S., 328.
The *Albemarle*, *supra*.
The *America*, 92 U. S., 432.
The *Pegasus*, 19 Fed. Rep., 46, 48.

III.—*Applying these principles to the facts as found by the Circuit Judge, it is submitted that his conclusions are erroneous.*

The *Pavonia* started from her slip at the foot of Chambers street, bound across the river for her slip in Jersey City, which was to the northward of Chambers street. At that time the *Breakwater* was off Barclay street, about four hundred feet out in the river, eight hundred feet below the *Pavonia*, proceeding up the river at a speed of six knots, to her pier which was north of Chambers street.

The collision took place 400 feet out in the river, and midway of the slip below pier 29 (old number), which was the first pier south of the Chambers street slips.

The course of the *Pavonia* crossed that of the *Breakwater*, and the northwest wind and ebb tide set the former down the river.

When the *Pavonia* was moving slowly from her bridge towards the end of new pier 20, which was the northerly boundary of her slip, she sounded her whistle, to which the

Breakwater replied with a single whistle, and stopped her engines; the *Pavonia's* bow then being at the end of said pier, which is 150 feet longer than the piers to the south. The *Pavonia* replied to the *Breakwater's* whistle with one whistle and started her engines full speed ahead; this the *Breakwater* answered with a single whistle and immediately reversed her engines, the *Pavonia's* bow then emerging beyond pier 20 and swinging somewhat down the river. The *Pavonia's* engines continued at full speed ahead until the collision took place. When the *Pavonia's* stern was clear of pier 20 she gave another whistle, to which the *Breakwater* replied with one; and before the collision the former sounded alarm signals.

A. The *Breakwater* was condemned because, having the *Pavonia* on her starboard hand, she did not reverse her engines when she gave her first signal (Record, 65).

There is no suggestion in the findings that the *Breakwater*, at that time, should or could have done anything more than reverse, and she is to be judged solely by reason of her omission in that respect.

If it was the duty of the *Breakwater* to reverse when she gave her first signal, that duty arose under Article 18, because the vessels were approaching so as to involve risk of collision, not because they were on crossing courses. In other words, Art. 16 did not impose that obligation upon her unless the situation came within Art. 18.

We submit that the circumstances did not indicate to her that there was risk of collision requiring reversing.

(1). The *Pavonia* was at the end of Pier 20, eight hundred feet above the *Breakwater;* she had only 250

feet and her own length to go in order to cross the *Breakwater's* path; her destination was up the river and away from the *Breakwater*, and the latter was proceeding against the tide and wind, with her engines stopped.

(2). The assenting signal of the *Pavonia* was an assurance to the *Breakwater* that the former could cross the latter's path in safety without forcing upon her the necessity of reversing as the only means of avoiding collision, and that the *Pavonia* would not create such risk.

(3). The Court held, however, that the *Breakwater* was bound to guard against the effect of the tide and wind upon the *Pavonia*.

The finding is, that the course of the *Pavonia* was the usual course of ferryboats leaving their slips under like circumstances; and that the *Breakwater* was at fault for not taking into consideration the probable and usual course of the *Pavonia* under the circumstances of the tide and wind.

This is imposing an unusual and onerous duty upon the *Breakwater* which the circumstances will not warrant. She had just come in from sea, and had reached Barclay street before the *Pavonia* commenced to move. She had, therefore no means of judging exactly how the *Pavonia* would be affected at this particular time as she got out in the river, especially in the face of the latter's assumption of ability to cross without involving risk of collision. The *Pavonia* had actual knowledge of the effect of the wind and tide upon herself, her trips being across the river, while the *Breakwater* had no means of acquiring such knowledge when she was called upon to act. Yet she was held chargeable for not reversing. This is a judgment after the event.

The *Adriatic*, 107 U. S., 515.
The *Beryl*, *supra*.
The Manhassett, 34 Feb. Rep., 408.

The refusal of the Court to find, as requested (17th and 19th requests) is equivalent to a finding that risk of collision was involved when the *Breakwater* first signalled The findings, as made, and the refusals to find as requested, were error.

The *America*, *supra*.
The *A. P. Cramner*, 19 Blatch., 507.
The *Baltic*, 2 Ben., 98.
The *Servia*, 30 Fed. Rep., 502.
The *Ulster*, 1 Maritime Law Cases, 234.
Marsden on Col., 2d edit., 453.
The *Manhassett*, *supra*.

(4). The subsequent action of the *Breakwater* is not open to criticism. As the *Pavonia's* bow emerged from her slip and swung down the river with the tide and wind, she gave a whistle, to which the *Breakwater* replied and immediately reversed, so that her headway was stopped when the collision occurred.

The situation at the time of the second signal had changed, and it was apparent that there was then risk of collison; for the *Pavonia* was coming at full speed down towards the *Breakwater*, and they were only a few hundred feet apart. Reversing was then an absolute duty, which the *Breakwater* promptly performed.

B. If when the *Breakwater* gave her first whistle the vessels were approaching so as to involve risk of collision, and it was, therefore, incumbent upon her to reverse, as the Court found, the same obligation rested on the *Pavonia*.

She was then inside her slip, moving slowly, and

could easily have stopped her headway and remained in safety until all risk was passed.

The signals and the "right of way" gave her no privilege to proceed in the face of existing danger; and if proceeding would create such danger, she was equally bound to obey Art. 18.

Knowing that the tide and wind would set her down towards the *Breakwater*, and for that reason the situation involved risk of collision, she had no right to proceed.

There is no right of way into collision, and if the situation charged the *Breakwater* with knowledge that there was risk requiring reversing, it charged the *Pavonia* with the same knowledge.

The *Columbus*, Abb. Adm., 384.
The *Nereus*, *supra*.
The *Venetian*, 29 *id.*, 460.
The *Manhassett*, *supra*.
The *Belleville and The United States*, 1 Newberry Ad., 497, 499.
The *Greenpoint*, 31 Fed. Red., 231–2.
The *Sunnyside*, *supra*.
The *Pegasus*, *supra*.

C. Assuming, however, for the argument, that there was no risk when the first signals were exchanged, yet, as the *Pavonia* passed beyond pier 20 and her bow swung down towards the *Breakwater* when the second signals were given, then, beyond any doubt, risk of collision was involved, and it was her duty to stop and reverse. This she could easily have done, as she was partly within her slip.

The *Pavonia* appreciated the danger then, for although she had previously received a signal of one whistle, the situation as she proceeded required that she should

signal again, showing that she thought the first signals were not understood, or that the *Breakwater* was not acting in accordance with them; she, therefore, repeated the signal.

When the *Pavonia* gave that second signal the *Breakwater* reversed at once. Not so the *Pavonia*; she kept on at full speed, and in so doing committed a flagrant fault, for risk of collision was then most imminent.

To hold the *Breakwater* in fault for not reversing at the first signal, and to hold that the *Pavonia* was not then required to reverse, nor at the second signal, nor at any time, is certainly an anomalous postion to take, and one which cannot be sustained.

Nor did the agreed signals relieve the *Pavonia* from this obligation to slow, or stop and reverse; for risk of collision was involved in her proceeding and she was as much at fault in assenting to such a course of action as if she had proposed it.

The *Albemarle*, *supra*.
The *Greenpoint*, *supra*.
The *Nereus*, *supra*.

Fourth Point.—THE COURT WILL EXAMINE THE RECORD TO ASCERTAIN IF ANY ERROR OF FACT OR OF LAW HAS BEEN COMMITTED, AND IF A MATERIAL FACT HAS BEEN FOUND WITHOUT TESTIMONY TO SUPPORT IT, OR IF THE COURT BELOW HAS REFUSED TO FIND A MATERIAL FACT WHICH THE TESTIMONY SUSTAINS, IN EITHER EVENT IT IS ERROR REQUIRING A REVERSAL OF THE DECREE.

I.—The appellant excepted to the conclusions of law (Record, 68), and made certain requests to find facts upon which the duty of each vessel depended.

By the 5th request (69) the Court was asked to find that the situation involved risk of collision when the *Pavonia* started. This related to the *Pavonia's* duty, and the refusal so to find was equivalent to holding the contrary, namely, that the situation did not then involve risk of collision.

By the 17th and 19th requests, the Court was asked to find that at the time of the first signal there was no risk of collision, and that it did not arise until the second signal. The refusal so to find was a decision to the contrary.

Bearing in mind that as the *Pavonia* started she sounded her whistle and the *Breakwater* replied with her first signal, it is apparent that the above rulings are inconsistent, and one or the other must be wrong. We have already referred to the findings with regard to each of the above situations, and the necessary conclusion is, that if the refusal of the 5th request was error, then the *Pavonia* cannot justify herself for proceeding; while if the refusal of the 17th and 19th requests was error, then the *Breakwater* did all the law required of her.

Reading the findings together, the conclusion of the Court below seems to be that the situation from first to last involved risk of collision, requiring the *Breakwater* to reverse, but not imposing any such duty, at any time, on the *Pavonia*. If such is the fair conclusion, we submit it is grave error.

II.—The Court refused to find the 15th and 18th requests, which relate to the *Pavonia's* ability to avoid the collision, although the testimony fully sustains them.

The Court found that at the time of the first signal the *Pavonia's* bow was about at the end of Pier 20, which is on the northerly side of her slip, and moving

under slow engines. She was, therefore, wholly within her slip, and in a place of safety. Certainly it was within her power to remain in that place of safety.

And so, when her bow commenced to emerge beyond Pier 20, and swung somewhat down the river, it was beyond question within her power to reverse, and thus get back into her slip, as she was not her length outside of it.

These requests may not be material, if the law imposed no duty upon the *Pavonia* except to proceed at full speed; but we submit that she was under obligation to conform to Article 18, and, if so, then these findings became of importance.

III.—The 7th request (70) has a bearing upon the *Breakwater's* duty, for the presence of so many vessels in her immediate vicinity would necessarily affect her navigation, by preventing the free use of her helm.

As the decisions below, however, were not placed upon any omission in this respect, the finding ceases to be of importance with regard to the *Breakwater*, although it characterizes the *Pavonia's* action as extremely hazardous, and even reckless; for she started to cross the bows of a number of vessels in close proximity, in the face of a tide and wind which would set her down upon them. The finding is fully sustained by the testimony (Gardiner, 20; Mosher, 23; Pawson, 25); and there is nothing to the contrary.

IV.—The exceptions to the refusals to find the conclusions of law as requested raise the questions of the duty of each vessel, under the circumstances as they existed. These have been already considered, and we confidently

submit that an examination of the principles involved must lead to a reversal of the decree of the Court below.

Fifth Point.—THE MOTION TO DISMISS THE APPEAL SHOULD BE OVERRULED AND THE MOTION TO AFFIRM THE DECREE DENIED.

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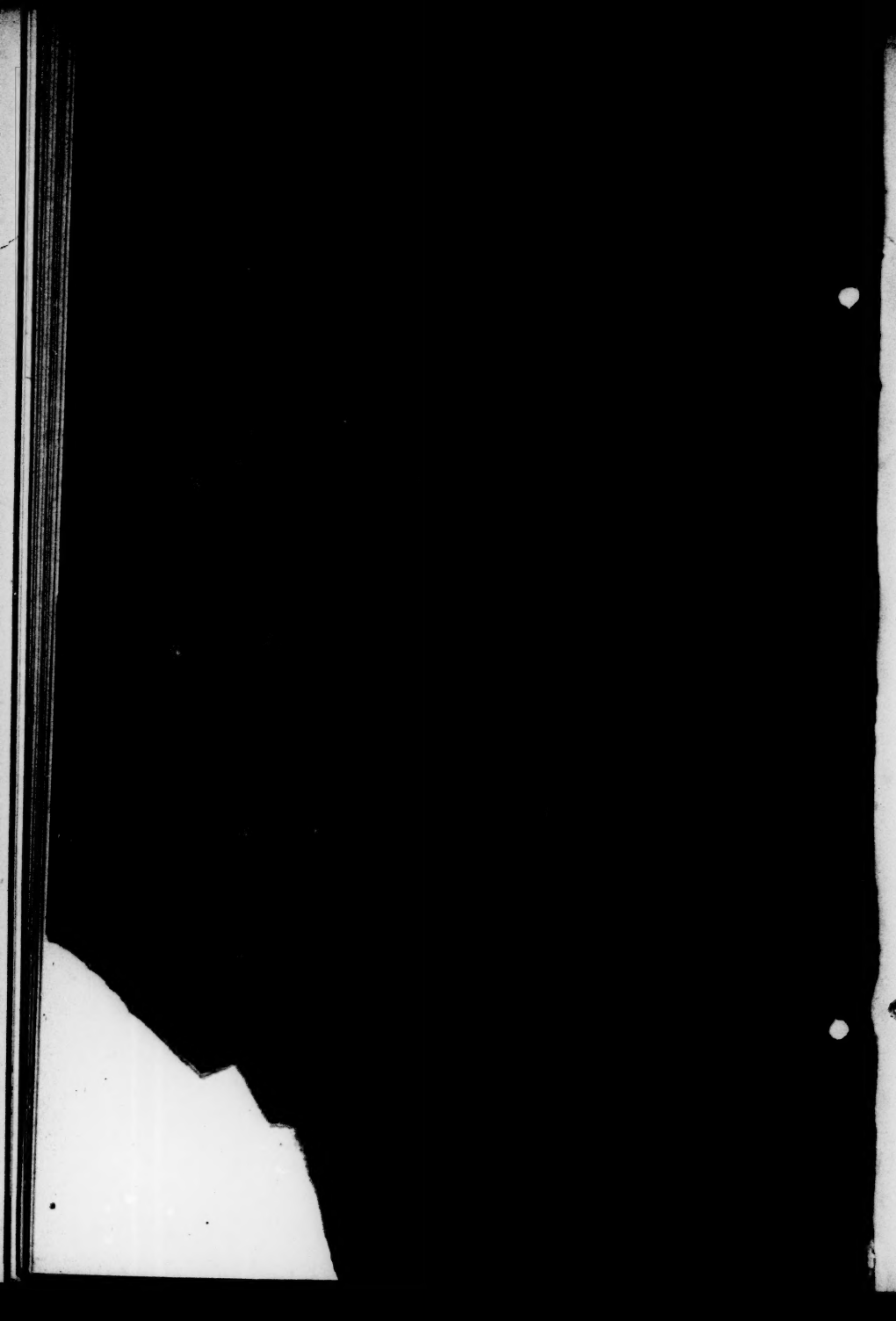
Pamphlets



Supreme Court of the United States.

THE STEAMSHIP BREAKWATER, HER ENGINES, &c., THE OLD DOMINION STEAMSHIP CO.,
Claimant and Appellant,

against

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD CO.,
Libellant and Appellee.

No. 61.
October Term, 1894.

Brief for Appellee.

STATEMENT.

This is an appeal from a final decree of the United States Circuit Court for the Eastern District of New York, entered October 7th, 1890 (p. 42), affirming a final decree in Admiralty in favor of libellant and appellee rendered by the District Court of said district. The report of the case in the District Court, with the opinion of the District Judge, will be found in 39 Fed. R., 511. The cause in the Circuit Court was heard by the late Mr. Justice Blatchford.

The libellant was owner of the ferryboat *Pavonia*, and filed the libel against the steamship *Breakwater*, of which the claimant and appellant was owner, for damages sustained by the ferryboat in a collision between those vessels. The collision took place on the 16th day of December, 1887, at about 4:50 o'clock in the afternoon, in the North river, about abreast of the middle of the slip between Pier 28 (old number), known as the Fall River Pier, and Pier 29 (old number), known as the Providence Pier, and about 400 feet out in the river from the ends of those piers (35, *62*). Immediately adjacent to Pier 29 (old number), and to the northward thereof, there were two slips of libellant's ferry, the more northerly of which was bounded on the north by a pier known as No. 20 (new number). No. 20 was the first pier to the north of 29 (old number), and

extended out into the river about 150 feet further than 29 and the piers below it (35, *63*). Shortly before the collision, the *Pavonia* left her upper or northerly slip, on the New York City side, on one of her regular trips, bound to her slip across the river in New Jersey, the latter slip being to the northward of Chambers street (35, *63*). The distance from the upper or northerly rack of the slips at Chambers street to the upper or northerly side of the pier at Barclay street, which was the fourth street south of Chambers, was 881¼ feet. The upper slip at Chambers street was 87½ feet wide; the width of the two slips was 200 feet (35, *63*). At the time the *Pavonia* left her bridge the *Breakwater* was about off Barclay street, coming in from sea on one of her regular trips to her berth at the foot of Beach street, which was to the northward of Chambers street. The tide was strong ebb, the wind northwest and the weather clear (35, *63*). The *Pavonia* started to move slowly out of her slip, under a hard-a-port wheel, which was fastened in the becket and so remained until the collision. As her bow emerged, the effect of the wind and tide was to swing it somewhat down the river, but this swing was overcome before the collision, at which time her bow was on a swing up the river (35, *64*). The wind and tide had the effect, also to set her bodily down the river. Her course, from the time of her starting until the collision, was the usual course of ferryboats on leaving their slips under like circumstances. The course of the *Breakwater*, from the vicinity of the Battery, was alongthe New, York docks. As she neared the Cortlandt street ferry slip she approached closer to the docks, and from that time continued on a course about 400 feet therefrom (35, *64*). The *Pavonia* sounded the usual long, single whistle, to warn approaching vessels, as she commenced to move. Shortly thereafter the *Breakwater* sounded in reply a single whistle, at which time the *Pavonia* was moving slowly, her bow having reached about the outer end of Pier 20 (new number) (35, *64*). The *Pavonia* immediately replied by a single whistle, which was answered by a single whistle from the *Breakwater*. The *Pavonia*, when her stern was about as far out as the outer end of Pier 20 (new number), sounded another single whistle to the *Breakwater*, which was answered by the *Breakwater* by a single whistle. Before the collision the *Pavonia* sounded alarm whistles (36, *64*). As soon as the *Pavonia* received the first whistle from the *Breakwater* her engine was put to full speed ahead, and so continued until the collision. As soon as the *Breakwater* sounded her first whistle her engine was stopped, and when the *Pavonia* sounded her other (or second) single whistle the engine of the *Breakwater* was immediately put full speed astern (36, *64–5*). The speed of the *Breakwater* at the time she sounded her first whistle was about six miles an hour, but at the time of the collision her headway by the land was almost entirely, if not quite, stopped (36, *65*). The stem of the *Breakwater* struck the *Pavonia* on the port side of the latter a little abaft her wheel, and cut through her guard into her hull, and

she was thereby seriously damaged (36, *65*). If the engine of the *Breakwater* had been promptly reversed when she blew her first whistle, her headway could have been entirely stopped in going her length of 212 feet, and the collision would have been avoided (36, *65*).

The foregoing facts are set forth in the findings. The claimant's exceptions thereto are not mentioned in the assignments of error, and have, therefore, been abandoned.

The facts are set forth fully here because the claimant's brief omits some important details, and contains statements which are not contained in the findings.

The omissions are:

1st. That the *Breakwater* was on one of her regular trips (5th finding, 35, *63*).

2d. That when the *Pavonia started*, her wheel was fastened in the becket hard-a-port, and *so remained until the collision* (7th finding, 35, *64*).

3d. That when the *Pavonia* had started her engine at full speed at the time of her reply to and in consequence of the *Breakwater's* first single whistle, the latter sounded another single whistle in answer. The *Breakwater* blew three single whistles (8th finding, 35, 36, *64*; Dole, master of *Breakwater*, 20, *36*). Only two are mentioned in Appellant's Brief.

The following statements in appellant's brief are not contained in the findings:

"It also appears that between the *Breakwater* and the New "York docks a tug was proceeding up the river, having in tow, "on a hawser 120 feet long, two barges, each about 90 feet "long, and connected by a hawser 50 feet long. That an- "other tug was proceeding up the river between the *Break-* "*water* and the New York docks, off the *Breakwater's* star- "board quarter, and another tug, with a lighter in tow, was "also proceeding up the river on the *Breakwater's* port "quarter" (p. 3 of brief).

This is true.

(3.) The *Breakwater* had to run from Barclay street to Old "Pier 29, 680 feet, before she reached the Chambers street "ferry slip; and ran about 580 feet, less than three lengths "to the place of collision" (p. 4 of brief).

This is true. She ran two lengths of 212 feet, 424 feet, and 156 feet in addition.

"(4th.) The *Pavonia* ran down the river to the middle of "the slip below Old Pier 29."

It is not true that the *Pavonia* ran down the river. She necessarily sagged, or was set bodily down the river, so that at the time of the collision, her lower side, on the agreed statement that the *Breakwater* had run up the river 580 feet, was 300 feet ("300" for convenience, actually 301¼) below the northerly rack of the ferry slips. The width of the ferryboat does not appear, but it does appear that the upper slip, in which she lay, was 87½ feet wide. She must have been less—say, for convenience, she was 75 feet wide. Therefore, her sag or set down the river was 300—75=225 feet.

"(5.) The *Pavonia* had to run 250 feet beyond the end of "New Pier 20, and her length, to get entirely across the *Break-*"*water's* path" (p. 4 of brief).

This is true, assuming the *Breakwater* should not change her course.

"(7.) The *Pavonia* was at rest in her slip and the *Break-*"*water* was in motion at Barclay street."

It is not true that the *Pavonia* was at rest in her slip when the signals were given, if the last mentioned proposition means to imply this. The 5th finding (35, *63*) stated that when "the *Pavonia* left her bridge the *Breakwater* "was about off Barclay street." The master of the *Break-water* said: "I had just passed Barclay street ferry when "my attention was first attracted to the *Pavonia;* the "forward end of the pilothouse was just past; the first "I noticed the ferryboat I heard her blow one whistle; the "ferryboat was underway coming out of her slip; she had "not got out as far as the end of the pier which is "above her slip. I blew one whistle to him; he blew one" (19, *35*, *36*). The pilot of the ferryboat said that when he received the *Breakwater's* first signal, the *Breakwater* "was "abreast of Barclay street ferry slip" (9, *17*). By the scale of the chart, annexed to the appellant's brief, it will be seen that the *Breakwater's* stem, at the time of her first whistle, must have been about off the northerly side of the pier above the Barclay street ferry, and this corresponds with the claimant's (3) proposition (agreed to by libellant), that the *Breakwater* ran "about 580 feet" to the place of collision (p. 3 of brief), and its (5) proposition (agreed to by libellant), that the "*Pavonia* had to run 250 feet beyond the end of New Pier 20, "and her length to get entirely across the *Breakwater's* "path" (p. 4 of brief), which necessarily assumes that the *Pavonia's* bow had then reached the end of that pier. And the 8th finding (35, *64*) so states.

"(8.) Between the times the *Breakwater* signalled and "stopped and signalled and reversed, the *Pavonia*, under full "speed bells, ran less than her length, her full speed being ten "or twelve miles" (brief, p. 4).

Assuming that the *Pavonia*, then, at the time of the first signal, was at the end of New Pier 20; up to the time of the collision she went across the river about 250 feet, and a little over half her length. (She was struck "a little abaft her wheel," 10th finding, 36, *65*). She was about 210 feet long (9, *17*). The distance across would therefore be about 360 feet. The distance down the river is shown above to have been about 225 feet. Her general direction was in the nature of the hypothenuse of a right-angled triangle with these figures for the base and perpendicular, making the distance traversed from about 420 to 450 feet. While she was going this distance the *Breakwater* had advanced 580 feet. Before stopping her engines she was moving "about 6 miles an hour." She then stopped and afterwards reversed, so that at the time of the collision "her headway * * * was almost entirely, if not quite, stopped" (9th finding, 36, *65*). It is therefore obvious that the headway of the *Pavonia* from the start could not have been "ten or twelve "miles," or as much as the *Breakwater's* amounted to, because she traversed a less distance. The pilot of the *Pavonia* said she was going very fast, under full headway, but he evidently did not mean that she had been going at the rate of ten or twelve miles from her start at full speed. She had been going as fast as she could under full speed of her engines, and was gathering headway, so that at the moment of the collision she may have been going under "full headway," but not before. His statement was merely an estimate. No finding or request to find on this point was made, and nothing can be argued from it.

"(9.) The *Breakwater* stopped at the first signal and re- "versed at the second. The *Pavonia* kept on at full speed, "notwithstanding all the signals" (p. 4 of brief).

The *Breakwater* did not stop at the first signal, which was the *Pavonia's* long single warning whistle. She stopped when she gave her first signal. With this correction the statement is true, excepting it should be said: The *Pavonia* kept on at full speed *in conformity* with all the signals.

First Point.

THE COLLISION WAS DUE TO THE NEGLECT OF THE BREAKWATER TO OBSERVE HER STATUTORY DUTY, CONFIRMED BY AN AGREEMENT OF SIGNALS, TO KEEP OUT OF THE WAY OF THE FERRYBOAT.

(A.) The District Court, Benedict, J., so held (39 Fed. Rep., 511), and the decision was affirmed by the Circuit Court, Blatchford, J.

It is now sought to overcome the effect of the 19th rule, held by those judges to be applicable to this case, by an assumption that the ferryboat was not in motion but was moored to her dock, and that therefore the rule did not apply.

The facts as they existed, however, and were found by the Circuit Court, leave no room for such a contention.

It appears by the findings and all the evidence that the ferryboat started to leave her bridge in the usual way. She proceeded slowly to the end of the pier on the northerly side of her slip, New Pier 20, for safety. "We cannot see up the "river till we get past Pier 20. That is the reason we come "out slowly" (Pilot, 9, *17*). The distance from the bridge to the end of the pier appears by the chart, annexed to claimant's brief, to be at least 300 feet. The *Breakwater's* witness, Baldwin, said it was over 100 feet from the outer end of the slip (meaning New Pier 20) to the ferryboat's bow as she lay in her slip (27, *49*). The ferryboat was 210 feet long and must have moved about 100 feet when the end of the pier was reached.

The master of the *Breakwater* said: "Something called my "attention on the other side just at the time she started. She "must have started when I was looking. I had not seen the "*Pavonia* before she started. When I turned and saw her, she "was blowing her whistle and had come out about half way "past her center pin" (20, *37*). "Half way past her center pin" (the center pin is the division of the two ferry slips) indicated a forward movement of about half her length, confirming the estimate of about 100 feet.

Therefore, instead of being "at rest," which is the basis of the argument contained in the claimant's first point, the ferryboat was under way on the *Breakwater's* starboard hand and on a crossing course. There could not be a plainer case for the application of the rule. The parties recognized it and acted under it.

The signals were in conformity with it (*Belden* vs. *Chase*, 150 U. S., 674, 684).

There could be no mistake about the meaning of the signals. They were recognized as an agreement that the ferryboat was to go ahead and the *Breakwater* would keep out of her way. The first whistle given was the long single whistle given by the ferryboat to warn approaching vessels as she commenced to move. The *Breakwater* then recognized the propriety of the *Pavonia* going ahead across her bows by giving her a single whistle. At this time the *Pavonia* was moving slowly. As soon as she received this whistle her engine was put full speed ahead, and the *Breakwater* then stopped her engine and confirmed the ferryboat's movement by another single whistle. There could be no doubt as to what was intended. The master of the *Breakwater* said: "Q. Why was it that you stopped "when you heard the first whistle of the Pavonia? A. I sup- "posed she was going across our bow and I would give her a "chance to go across" (20, *36*, *37*).

The difficulty, and the cause of the collision, was that he did not " give her a chance to go across."

The Court found that if the *Breakwater* had reversed when she thus undertook, in accordance with her duty, to keep out of the *Pavonia's* way, there would have been no collision (36, *65*).

Not even a plausible excuse is given for her neglect.

In the master's direct-examination, he attempted to create the impression that he was surprised at the sagging down of the *Pavonia*. He there said : " When I first thought there was " any danger was when I saw the ferryboat pointing right down " the river " (20, *37*); but he afterwards admitted that "the most " that the *Pavonia* got headed down was from W. S. W. to " S. W. by W., two to three points " (21, *38*). And it appeared that he had expected the tide to set her down and calculated it would not be over " two hundred " feet (20, *37*). As a matter of fact, she sagged down about 225 feet, as shown in the statement of facts herein, so that there was a very slight excess over his calculation. And at the point of collision he had not brought his steamer to a stand still. She " was almost entirely if not quite " stopped " (36, *65*). In any event, being under the duty of avoiding the *Pavonia*, by statute and agreement, it was no excuse that he had miscalculated the extent of the sagging. It " was the usual course of ferryboats on leaving their slips under like circumstances " (35, *64*), which he was bound to know. He was clearly negligent in failing to allow for the contingencies of navigation and the effect of the tide.

The City of Springfield, 29 Fed. Rep., 923 ; affirmed, 36 *Id.*, 568.
The Beta, 40 *Id.*, 899.
The Cyclops, 45 *Id.*, 122.
The Intrepid, 48 *Id.*, 327.

In the last of these cases, it was said by Brown, J.: " A " signal of one whistle was immediately exchanged between the " two boats. The evidence is conflicting as to which boat gave " the signal first, but that is immaterial, as all agree that the " answer was given and heard at once. * * * * I am " satisfied that when the signal of one whistle was exchanged " the tug and tow were about off South Fifth street ; that is, " about 800 or 900 feet from the point of collision. Had the " *Intrepid* reversed when she gave her one whistle to the " *Jamaica*, instead of waiting a considerable time before re- " versing, the collision would have been avoided, because she " not only would have been stopped before reaching the track " of the *Jamaica*, but the *Jamaica* would also have been from " one to two lengths to the westward of the course of the " *Intrepid* before the latter got near her. The *Jamaica* was on " the starboard hand of the *Intrepid ;* both were under way, " and on crossing courses. The signals exchanged meant that " the *Jamaica* should go ahead ; and it was therefore the duty

" of the *Intrepid* to keep out of the way, both by the terms of " the nineteenth rule of navigation, as she had the *Jamaica* on " her starboard hand (*The Narragansett*, 4 Fed. Rep., 244), and " also as a necessary consequence of the signals exchanged be- " tween them. The agreement made was a proper one for pas- " sing each other. The *Intrepid* could easily have kept out of " the way, and the agreement imported that she would do so. " It was her duty to use the proper and necessary means to do " so. Any delay in reversing was at her own risk if there was " no subsequent fault of the *Jamaica*. The *Intrepid*, more- " over, had knowledge of the precise place of the *Jamaica*, of " the distance that separated them, and of her own power, and " she was bound to make all necessary allowance for the sagging " and winding course of the *Jamaica* under the well-known " effects of the ebb tide on coming out of her slip. *City of* " *Springfield*, 29 Fed. Rep., 923 ; affirmed, 36 Fed. Rep., 568 ; " *The John S. Darcy*, 29 Fed. Rep., 644, affirmed, 38 Fed. " Rep., 619 ; *The Baltic*, 41 Fed. Rep., 603. Her delay in re- " versing was, therefore, the immediate cause of collision, " and for this she must be held to blame. If the distance of " the boats apart at the time the whistles were exchanged was " not sufficient to enable the *Intrepid* to keep out of the way " by reversing at once, then the two other faults of the *Intrepid* " would become material, namely, her navigating without " necessity so near to the Brooklyn shore, where the view of " her was obstructed to the ferryboat while leaving the slip, and " her excessive speed of six knots in that situation, when so " heavily loaded with floats ; but, as the evidence leaves no " doubt that there was plenty of time for the *Intrepid* to have " kept out of the way by reversing at once after the exchange " of signals, it is not necessary to dwell on these latter points. " *The Titan*, 44 Fed. Rep., 510."

The Court correctly found here that it was incumbent on the *Breakwater* to reverse at once, and that the collision would have been avoided thereby. It is demonstrable, however, that she could have gone on more than a length further without stopping, and then by reversing could have avoided the collision with a considerable margin.

From the time of the agreement by signals to the place of collision she advanced 580 feet. She was 212 feet long. From a headway of 6 miles an hour, she could have been entirely stopped in going her length (11th finding, 36,*65*). If she had reversed at first, there would have been 368 feet between her stem and the place of collision. If she had advanced another length at the rate of 6 miles an hour and then reversed, there would have been 156 feet between her stem and the place of collision.

Under such circumstances, while there was a legal burden on her to reverse at once, if necessary, it is clear there was ample opportunity for a vigilant pilot to determine what was proper to be done before action became imperative. There was no time, however, for a relaxation of vigilance such as un-

doubtedly occurred here. Having stopped the boat, the master seemed to think nothing further was necessary, and allowed his attention to be diverted. But the pilot of the *Pavonia*, seeing that the *Breakwater's* headway was such as to cause danger, blew another single whistle. The master of the *Breakwater* said: "My attention was called to the ferry-"boat by her blowing one whistle again. I answered one "whistle and saw by the way he was heading that there might "be danger, and I rang down backing bells; the order was "obeyed" (19, *36*, 20, *37*).

(B). In addition to the obligation cast upon the *Breakwater* by the 19th Rule, the *Pavonia* had the right of way for her necessary course out of her slip, and the *Breakwater* was bound to observe and avoid her.

The Relief, Olcott, 104, 109.
The John S. Darcy, 29 Fed. Rep., 644.
The West Brooklyn, 45 *Id.*, 60.
Affirmed 49 *Id.*, 688.
The Favorita, 8 Blatchf., 541; affirmed 18 Wall., 598.
The Brooklyn, 62 Fed. Rep. 759.

In the *John S Darcy* it was said by Brown, J. (647):

"The necessities of the case for the protection of human "lives long since led Judge Betts to declare in this Court that "it was 'indispensable that the exit from and entrance into "the ferry slips should not be checked or embarrassed by the "presence of other vessels passing close to them' (*The Relief*, "Olcott, 104, 109). The duty of vessels to keep away when "they can from the known path of ferryboats close to the "slips has since been repeatedly affirmed, and, so far as I am "aware, has never been relaxed. Any voluntary disregard "of this obligation has since been uniformly held to be a "fault."

In the *C. H. Senff*, 32 Fed. R., 237, the same Judge said: "I must hold the *Senff*, therefore, to blame for undertaking to "cross the known course of the ferryboat, instead of keeping "out of her way, as she should have done."

There are no authorities in conflict with the above.

The *Columbus* (Abb. Adm'y, 384), has no application. The ferryboat was not held in fault there for leaving her slip, and the *dictum* of Judge Betts (p. 387) that: "A steamer, although "appointed to go out at fixed periods, is bound to remain in her "slip, notwithstanding the time of her departure has arrived, if "a vessel is seen, or is in a position to be seen outside, which she "will be in danger of striking if got under way at the time," is answered by the obvious fact in this case that there was no danger if the *Breakwater* had performed her duty.

Nor has the *Belleville* (1 Newbury, 497, E. D. Louisiana, 1854). There the collision occurred "one quarter, or one third "of the distance of the width of the river from the Orleans

"shore." That ferryboat relied on the right to a certain track across the river without regard to the rules of navigation or ordinary precautions.

In the *Manhasset* (34 Fed. Rep., 408, 422), cited by the claimant, the ferryboat was not leaving or approaching her slip, and was held in fault for a collision which was caused by the absence of a lookout (424).

In the *Nereus* (23 Fed. Rep., 448), also cited by the claimant, the collision occurred about in the middle of the river. The ferryboat, the *Jamaica*, was held in fault, because, having the *Nereus* on her starboard hand, she attempted to cross the bows of the *Nereus* without justification.

In the *Washington and D. S. Gregory* (2 Ben., 226), the ferryboat was approaching her slip. The other steamer had the ferryboat on her own starboard hand. The ferryboat was therefore required to keep her course and was condemned because she did not (234). The Judge (Blatchford) said the ferryboat was also in fault for maintaining her speed without having receiving a response to her signal that she intended to go ahead (235). "Each boat was attempting to head off the "other. Neither would give way to the other * * * and "each blindly and recklessly rushed into the impending peril" (237).

It is obvious that no authorities cited by the claimant have any bearing upon the question.

The case is controlled by rules of navigation aptly expressed in

The John Taylor, 6 Ben., 228.
(Decided November, 1872, by Blatchford, J.)

There the situation was very similar to the one in controversy here. The ferryboat *John S. Darcy*, bound from New York to Jersey City, left her slip on an ebb tide. She was under a port helm to get a good offing, so as not to be carried so far down as to be below a proper point from which to reach her slip on the opposite side of the Hudson river. Her Jersey City slip was further down the river than her New York slip. Out in the river, and below her, was a propeller coming up the river and having the ferryboat on her starboard hand. When the ferry-boat cleared the line of the piers, her pilot, perceiving the propeller, blew one whistle. Receiving no reply, he blew another single whistle, to which the propeller responded with a single whistle. The propeller immediately slowed, stopped and backed her engine, and put her wheel hard-a port, while the ferryboat kept on without slowing, till her pilot saw that the propeller would hit the ferryboat, when he starboarded his helm, changing the course of the ferryboat, but not contributing to the collision which ensued, the propeller striking the ferryboat on the port side nearly amidships. *Held*, that as the courses of the vessels were crossing, and the propeller had the ferryboat on her starboard hand, it was the duty of the latter to keep her course, and the duty of the propeller to avoid her: that the propeller had no right to suppose that, because the

ferry slip on the Jersey side was lower down the river than the one on the New York side, therefore the ferryboat would drop down the river, and go under the stern of the propeller, since the course taken by the ferryboat was the usual one on such a tide; that the ferryboat was not in fault in keeping on without slowing, especially under the signals given; that the propeller was solely in fault for the collision.

It will be seen that the case at bar is stronger for the ferryboat, because here the agreement that she should go ahead was made immediately, and when there was ample opportunity for the *Breakwater* to perform her duty; while in the *John Taylor* the other vessel did not agree at once, and it was not until the ferryboat signalled the second time that the agreement was made.

Woodruff, J., in affirming the *John Taylor* in the Circuit Court, said (in the manuscript opinion, not reported): "That "it was the *prima facie* duty of the *John Taylor* to keep "out of the way of the ferryboat, is as clear as the express "rule of the Statute and repeated decisions of the Court "can make it; and the correlative duty of the ferry-boat to "keep her course is *prima facie* no less clear. * * * "Upon the principal questions involved in this case the de- "cisions of the Supreme Court in the *Corsica* (9 Wallace, "630), and in *The Columbia* (10 Wallace, 246), are singularly "pertinent. Indeed, had the opinions been prepared in view "of the facts here proved, they would be deemed not only apt "but conclusive."

The decree of the Circuit Court in the *John Taylor* was affirmed by this Court on the 28th day of February, 1876, as appears by a memorandum as follows: "Mr. Chief Justice "Waite announced the decision of the Court. This case pre- "sents a question of fact alone. The two Courts below agree. "After a careful examination of the pleadings and the evi- "dence we are satisfied with the conclusion they reached."

The decision is not reported. The case was No. 158 of October Term, 1875. This memorandum is with the files.

(C.) There was also an obligation imposed upon the *Breakwater* because she had the advantage of the tide to assist her in keeping out of the way by reversing.

The Galatea, 92 U. S., 439, 446.
The Volunteer, 49 Fed. Rept., 477, 478.

Second Point.

THE RULES, AS WELL AS THE AGREEMENT OF SIGNALS AND THE EXIGENCY OF THE SITUATION, REQUIRED THE PAVONIA TO KEEP HER COURSE AND SPEED.

The 23d and 24th rules of navigation provide:

23. *Where by rules 17, 19, 20 and 22, one of two vessels*

shall keep out of the way, the other shall keep her course subject to the qualifications of rule 24.

24. *In construing and obeying these rules due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger.*

The claimant contends that these rules do not apply, but that the *Pavonia* was in fault under rule 21, which provides:

Every steam vessel when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse.

This contention of the claimant involves the propositions that there was risk of collision when the *Pavonia* started, and that she was not legally entitled to rely upon the *Breakwater's* duty and agreement to keep out of the way.

The answers to this are clear.

1st. *There was no real or apparent risk of collision when the Pavonia started.*

This has been demonstrated in the statement of facts and under the first point, where it was shown that the *Breakwater*, by reversing, could have stopped her headway 368 feet below the point of collision, and that if she had run another length at her speed of six miles, and then stopped and reversed, the collision would still have been avoided by 156 feet.

Such being the case it is obvious that the *Pavonia* was not then proceeding in violation of Rule 21.

All the authorities hold she was bound by the provisions of the 23d rule and would have been in fault if she had stopped and reversed, unless she could have justified herself by *proving clearly* that she was *in extremis*.

The Northfield, 4 Ben., 112.
(Affirmed by this Court. Book 24 U. S. Sup. Court Repts., 680; Hutchinson *vs.* Northfield, 24 L. C. P. Co. Rep., 680, 681.)
The John Taylor, *supra*.
The General Grant, 6 Ben., 465.
The Corsica, 9 *Wall.*, 630.
The Cayuga, 14 *Id.*, 270.
The Scotia, *Id.*, 170.
The Free State, 91 U. S., 200.
The Illinois, 103 *Id.*, 298.
The Adriatic, 107 *Id.*, 512.
The Favorita, *supra*.
The St. John, 34 Fed. Rep., 763.
The Intrepid, *supra*.
The Nacoochie, 137 U. S., 340.
The Britannia, 153 U. S., 130.
The Nutmeg State, 62 Fed. Rep. 847.

In *The Northfield*, *supra*, it was held by Blatchford, J., that

a steam vessel was in fault, under the provisions of Rule 23, for stopping her engine.

In *The John Taylor*, the same Judge held that the ferryboat was bound to go ahead.

In *The General Grant, supra*, it was said by the same Judge (466): "When a change of course is admitted or established on "the part of a vessel which is under obligation to keep her "course, as against another vessel which is bound to avoid the "former vessel, a very close scrutiny of the conduct of the "former vessel is necessary. She has violated an express rule "of navigation. Whenever such a change of course has taken "place, it is always set up, that the other vessel was taking no "step to get out of the way. Such an excuse for a change of "course is easily made but it is not to be favored, because, "while it tends to hold rigidly the one vessel to her duty of "getting out of the way, it tends to relax the obligation on the "other to keep her course. Both duties are correlative and "of equal force." * * * "It would be a very unsafe "principle to adopt, that, where there is no danger, and the "vessel on which rests the duty of avoidance sees and appre-"hends no danger, the other vessel may without ground, "apprehend danger and change her course and cause a col-"lision, and then claim, that because the change was made at "a very short distance off, and at a very short time before "the collision, it was made in the extremity of peril."

These principles have for a long time been thoroughly established, and are recognized and enforced in the remainder of the cases cited, as well as by many others.

2d. *After the Pavonia started she was required to keep her headway to avoid collision, and to rely upon the Breakwater's agreement to keep out of her way.*

As it turns out since the event, there was danger of collision when, after the *Pavonia* had swung out into the tide, she saw that the *Breakwater* was still maintaining some headway and the *Pavonia* blew another whistle.

It is contended by the claimant that the *Pavonia* thereby recognized risk of collision, and was in fault for not stopping and reversing, and in support of this contention it is said (Brief, p. 23): "As she was not entirely out of her slip she "could easily have stopped that headway and backed into the "quiet water in her slip (Baldwin, Record, p. 28)."

The first answer to the proposition is that there was no finding, nor request to find, to that effect, nor does the record show any such state of facts.

The 1st 8th finding states: "The *Pavonia*, when her stern "was about as far out as the outer end of Pier 20 (new number), "sounded another single whistle to the *Breakwater*, which was "answered by the *Breakwater* by a single whistle (36, *64*)."

The *Breakwater's* witness, Baldwin, assuming himself to be a ferryboat pilot, said in substance that if he had any doubts

about clearing the steamer he would have remained in the slip, or gone ahead full speed from the moment of leaving the bridge. But as the ferryboat was under the same obligation to any descending vessels (which she would not see till she got to the end of the pier), as the *Breakwater* was under to her, that is, to keep out of the way under the starboard hand rule, she was of course required to observe the precaution of moving slowly at first. If the agreement with the *Breakwater* had been made at the moment of leaving the bridge, and full speed was necessary from that moment to give the *Breakwater* a proper opportunity to fulfill her part of the agreement, the latter might reasonably have complained of the slow movement of the ferryboat if it had been shown to have affected her injuriously, unless she was bound to know and anticipate it; but that question is not in this case, because the agreement was not made until the ferryboat, having gone 100 feet forward, reached the end of the pier. Therefore the witness's propositions have no bearing upon the actual situation. And he does not say he would have attempted the manœuvre of backing into the slip after she got started, under the agreement, but, "At the time my bow struck "the tide and swung down towards the steamer, seeing I "couldn't have gone ahead of the steamer, I should have "stopped and backed and *gone inside of her* (28, *51*)."

As the claimant contends that the *Breakwater* could not port her helm and go to starboard, because of vessels between her and the docks (Brief, p. 7, citing Record, pp. 14-21), it is quite obvious that the ferryboat could not, in order to save a collision with the *Breakwater*, have gone inside of her without colliding with those other vessels, assuming *arguendo* that it was possible for the ferryboat to avoid her under the circumstances.

Up to the time when, at the end of the pier, the *Breakwater* told her to go ahead, it was within the *Pavonia's* power to remain in the shelter of the slip, and if the *Breakwater* was not satisfied that she could give the ferryboat ample room to go ahead in safety, she should have blown a signal to that effect, and not the one which induced the ferryboat to venture out of the shelter.

The second answer to the proposition is, that after the ferryboat got into the tide it was clearly impossible for her to lessen her headway without increasing her set-down towards the *Breakwater* and the consequent danger of collision.

It was said in the *Nereus* (*supra*): "As the Jamaica "went out of her slip the strong flood tide swept her "bows as usual up the river. She started with engines at full "speed and with a wheel hard-a-starboard, as usual at that "time of tide, so as to counteract as quickly as possible the "upward sweep caused by the tide" (450). The tide necessarily has the effect of carrying a boat with it at first, and it was expected by every one concerned in the navigation here that the

best way to overcome it was for the ferryboat to go ahead as fast as possible. The claimant here asked the Court to find to that effect: "That if the *Pavonia* after starting had continued at "full speed she would have overcome the effect of the wind and "tide and headed more directly across the tide instead of head-"ing down to and towards the *Breakwater*" (14th proposed finding of fact, 39, *72*). And "The *Pavonia* was in fault for not "keeping up her full speed after having started to overcome "the tide and wind" (3d proposed conclusion of law, 40, *74*). These were properly disallowed, because they sought to impose this duty on the ferryboat from the time of starting (13th proposed finding of fact, 39, *72*). If they had referred to starting under the agreement, they would have been eminently proper; but, in any event, they show what is here contended for, viz.: that full speed was necessary to give the *Breakwater* as much room as possible.

When, therefore, the *Pavonia* got out beyond the pier, she was in the situation of being obliged by the signals, and by prudence, to rely upon the *Breakwater* to fulfill her obligation, and anything but what she did do would have impaired the *Breakwater's* power to perform her duty.

Though it actually turned out that danger of collision then existed, the *Pavonia* could not know or act on that theory in the face of the *Breakwater's* telling her to go ahead. The latter was the one to determine what she could do, and the *Pavonia* was entitled to rely on it. It will be noted that while the *Pavonia* was going ahead at full speed and the *Breakwater* was reversing at full speed, the latter signalled, by the 3d single whistle, to keep going.

Even in the case of a departure from the rules of navigation where one vessel initiates a movement to go ahead, when she should have gone astern or waited, under the starboard hand rule, the other vessel is not required, by her assent, to stop and reverse at once. For a certain time the *Pavonia* had a right to rely upon the ability of the *Breakwater* to do what she undertook.

The Greenpoint, 31 Fed. Rep., 231, 232.

"She could not lawfully have * * * reduced her speed "except under the pressure of evident and positive necessity, "in order to avoid collision. (*The Northfield*, 4 Ben., 112; "*The Britannia*, 34 Fed. Rep., 546; *The St. John*, Id., 763.")

The Susquehanna, 35 Fed. Rep., 320, 323.

In *The Britannia* (34 Fed., 546), it was held by the District Judge that one of the vessels, *The Beaconsfield*, created risk of collision by stopping, and was therefore partly in fault. He said (553):

"While the proper manœuvre is pending, after an under-"standing by signals, the privileged vessel has no right to

"assume that the other vessel is not executing it properly, or "that there is any risk of collision under rule 21. The agree- "ment for the time being presumptively terminates the risk of "collision, and rule 21 does not come into operation. (*The Free "State*, 91 U. S., 204; *The Clement*, 2 Curt., 368; *The Northfield*, 4 *Ben.*, 117.)"

In the Circuit Court (42 Fed. Rep., 67), it was held that the *Beaconsfield* was justified in reversing, because the movements of *The Britannia* indicated that she, apparently, was not, by her helm, fulfilling her duty and agreement to go to the eastward and astern, but had a slight swing to the westward, and was heading so as to cross the bows of the *Beaconsfield*, which created apprehension of collision on the *Beaconsfield* (9th and 13th findings, in Record in *The Britannia*). And the *Beaconsfield* was also excused for stopping, because "the situation of the *Beaconsfield* was such "that further progress in her course involved risk of ground- "ing, without assurance of avoiding the collision" (11th Find- ing, Opinion, 73 in same record).

The decision of the District Judge in *The Britannia* fully supports the correctness of the ferryboat's navigation in the case at bar. That of the Circuit Judge does not indicate that a vessel in the ferryboat's situation should be required to stop and reverse, but merely that one in the situation of the *Beaconsfield* should be excused for stopping and reversing under the circumstances. This Court, in revers- ing the Circuit Court and affirming the District Court, made it perfectly clear that if a vessel in the Pavonia's situation should stop, she would not be excused. And it is doubtful if the ex- tenuating circumstances could have been found here which caused the dissenting opinion in *The Britannia*, where it was said of the *Beaconsfield*: "Her conduct, so far from being "reckless or in violation of the rules of good seamanship, "appears to me to have been characterized by an excess of "prudence, which, even if it were an error, was not a fault "for which I would willingly condemn her" (153 U. S., 145).

The English authorities require a much more strict adher- ence to their article 18, which is similar to our rule 21, than is required by our decisions when a duty is created by our rule 23.

In *The Memnon* (6 Asp. Mar. Cas., 317), cited by the claim- ant, it would appear that the Judges in the Court of Appeals felt themselves constrained to hold a vessel liable for not stopping and reversing, even though they were of the opinion that, going ahead, "as a matter of simple navigation," was the best thing to do. Lindley, L. J., said: "This is an illustra- "tion of the effect of attempting to navigate ships by Act of "Parliament, the effect being to saddle a man who has done "nothing wrong in point of seamanship, with damages for a "collision which but for the Act of Parliament could not be "said to have been brought about by his act" (319). This statement obviously failed to give due consideration to Art. 23: "In obeying and construing these rules, due regard shall be "had to all danger of navigation which may render a departure

" from the above rules necessary in order to avoid immediate " danger." An appeal was taken to the House of Lords. The case was affirmed on the facts, but it was there-distinctly stated, by Lord Herschell, that the whole effect of the previous decisions, illustrated by *The Beryl* (5 Asp. Mar. Cas., 321), was to impose a burden on a vessel not stopping and reversing, when there was apparent risk of collision, to show to the satisfaction of the Court that the circumstances of the case made a departure from the regulations necessary. The syllabus states: "*Semble, that if it is* " *shown by a ship not complying with Art. 18 of the Regula-* " *tions that, taking into consideration all the circumstances* " *of the case, compliance with the regulation would have in-* " *creased the risk, such non-compliance will not cause the ship* " *to be held in fault.*"

The Memnon, 6 Asp. Mar. Cas., 488.

Even applying the English construction of the rules to the case at bar, the *Pavonia* fully satisfied every obligation. (*The Benares*, 5 Asp. Mar. Cas., 171). If she had stopped and reversed, she would clearly have precipitated a collision. The facts demonstrate it, and it was the judgment of both masters that her best course was to go ahead, as evidenced by their reiteration of the agreement.

Under our authorities, apart from the last signals of one whistle each, if the *Pavonia* had stopped and reversed, she would have subjected herself to the burden of proving that she was then *in extremis*, as in

The Favorita, 18 Wall., 598.

The signals being given, unless it was perfectly clear that the *Pavonia* could have avoided the collision by stopping and reversing, she was required to keep her course and speed.

In the *John Taylor*, *supra*, it was said by Blatchford, J.: "It is also insisted that the ferryboat should have slowed, " stopped and backed before she did. But she would have " been in fault if she had done so, especially after the single " blast in response from the propeller, which indicated that the " propeller expected the ferryboat to keep going on in the " course she was on" (6 Ben., 230).

In the *Intrepid*, *supra*, it was said by Brown, J.:

"2. I do not think the evidence establishes any fault in " the *Jamaica*. As the *Intrepid* was obscured from view when " the *Jamaica* started from her slip, the latter was not in fault " for starting; and, as she was half or two-thirds out of her " slip, under full speed of her engines, and pursuing her usual " course, when the *Intrepid* first became visible close to the " Brooklyn shore, she was under no obligation to return to " her slip, simply to accommodate the *Intrepid*, which was on " her port hand, if the *Intrepid* was able to keep out of the

" way. The immediate exchange of signals in accordance with " the rule of the local inspectors determined the obligations of " both vessels, namely, that of the *Jamaica* to go ahead, and " that of the *Intrepid* to reverse at once, if she could not " otherwise avoid collision. Although the pilot of the " *Jamaica* might, in the exercise of great prudence, have gone " back if he had known that the *Intrepid's* tow projected as " far ahead of her lights, I do not see how this affects the " *Jamaica* with fault in the absence of that knowledge. As " the situation appeared to the pilot of the *Jamaica*, there was " plenty of room for her to pass ahead in accordance with the " signals exchanged, and that was also the fact. The *Jamaica* " did all that was required of her in putting her wheel at once " hard-a-port, and, when the projecting tow became first vis- " ible, giving another jingle for extra speed. The practice of " the *Intrepid* not to carry head lights on her tow, which dif- " fered from all the other tugs that carried car floats project- " ing far ahead, was not brought home to the pilot's knowl- " edge; and no such special habit of the *Intrepid* affected him " with presumptive knowledge of her practice without actual " notice of it. As respects the case generally, it should be " said that the navigation of the *Intrepid* at full speed so near " the Brooklyn shore with heavy floats projecting so far ahead " of her without head lights, and with tow lights so far astern, " was imprudent navigation. When the whistles were ex- " changed the pilot of the *Intrepid* knew precisely all the facts " and circumstances affecting the situation, whereas the pilot of " the *Jamaica* did not know them. It was the duty of the " *Intrepid* in that situation to have exercised corresponding " care, and to have reversed at once. Nothing prevented her " from doing so. As the *Jamaica* failed in no duty, the blame " of the collision must rest wholly upon the *Intrepid*."

3d. *If the master of the Pavonia erred in judgment in going ahead instead of stopping and backing, it was not a fault.*

The fact that a few feet more space (she was struck abaft her wheel) would have enabled the *Pavonia* to escape the collision, shows that keeping her course and speed was the best thing for her to do, but if it was not, the severest criticism that can be made is that there was an error of judgment *in extremis*.

In such event she would not be liable.

It was said in the *Favorita*, Davis, J. (*supra*, at p. 603):

" It is said if the *Manhassett* had advanced instead of stop- " ping she would have cleared the steamship. This may or " may not be true, but if true, she is not in fault for this error " of judgment. It was a question whether to advance or to " stop and back, and the emergency was so great that there " was no time to deliberate upon the choice of modes of escape. " In such a moment of sudden danger, caused by the miscon-

" duct of the *Favorita*, the law will not hold the pilot of the " *Manhassett*, acting in good faith, guilty of a fault, if it " should turn out after the event that he chose the wrong " means to avoid the collision, unless his seamanship was " clearly unskillful. And this we do not find to be the case. " On the contrary, if there were error at all, it was such a mis- " take of judgment as would likely be committed by any one in " similar peril. If the *Favorita* had been where good naviga- " tion required her to be, or had she slackened her speed so as " to be able to stop as soon as she discovered the *Manhassett*, " the danger would not have existed, nor the accident hap- " pened. She is, therefore, in our opinion chargeable with all " the consequences that flow from this collision."

And in the *Nacoochie* (*supra*, at p. 340) it was said by Blatchford, J.: "It is contended that the schooner could have " avoided the collision by porting her helm when she saw the " steamer. But it was the primary duty of the schooner, " under Rule 23, to keep her course; and, when her master " was notified of the approach of the steamer, he told the man " at the wheel of the schooner to keep his course, and " no change was made in her helm up to the very moment of " collision. Even if it was an error of judgment in the " schooner to hold her course, it was not a fault, being an act " resolved upon *in extremis*, a compliance with the statute, and " a manœuvre produced by the fault of the steamer. *New* " *York & Liverpool Steamship Co.* vs. *Rumball*, 21 How., 372, " 383; *The Nichols*, 7 Wall., 656, 666; *The Carroll*, 8 Wall., " 302, 305; *The Elizabeth Jones*, 112 U. S., 514, 526; *The* " *Bywell Castle*, 4 Prob. Div., 219."

4th. *From any standpoint the navigation of the Paronia was without fault.*

A concurring conclusion of the District and Circuit Judge is always entitled to great consideration.

The City of Paris, 9 Wall., 634, 639.

This should be especially observed here, the Judges having possessed unusual experience in collision cases. The case to them was such a simple one, involving the most ordinary rules of navigation, that it was scarcely deemed worthy of an opinion by the District Judge, as shown by the brief one written, and the Circuit Justice contented himself with the findings of fact and conclusions of law.

5th. " *The case is one for the application of the rule that a* " *vessel which is primarily in fault for a collision cannot* " *shift its consequences in part upon the other vessel, without* " *clear proof of the contributory negligence or fault of the* " *latter. Her own negligence sufficiently accounts for the* " *disaster. The Comet*, 9 Blatchf., 323." (Per Wallace, J.), in

The John King, 49 Fed. Rep., 469, 474, and see
The Clarion, 27 Fed. Rep., 128, 131, and
The City of New York, 147 U. S., 72, 85.

Third Point.

THERE IS NO MERIT IN THE APPEAL AND IT SHOULD BE DISMISSED, OR THE DECREE OF THE CIRCUIT COURT SHOULD BE AFFIRMED, WITH COSTS AND INTEREST, AND TEN PER CENT. DAMAGES FOR THE DELAY.

It will be seen that the whole theory of the claimant's argument in this Court depends upon a supposititious state of facts throwing the burden of the navigation upon the ferry-boat. Under the facts as they existed, the burden belonged to the claimant's vessel, leaving no room for argument under the rules and authorities.

The appeal is without merit and apparently taken for delay. It seems a case calling for the full application of the 23d Rule, as amended March 10, 1890 (137 U. S., 710).

Respectfully submitted,

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" of judgment. It was a question whether to advance or to
" stop and back, and the emergency was so great that there
" was no time to deliberate upon the choice of modes of escape.
" In such a moment of sudden danger, caused by the miscon-